TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 257.

THE CORINNE MILL, CANAL AND STOCK COMPANY, PLAINTIFF IN ERROR,

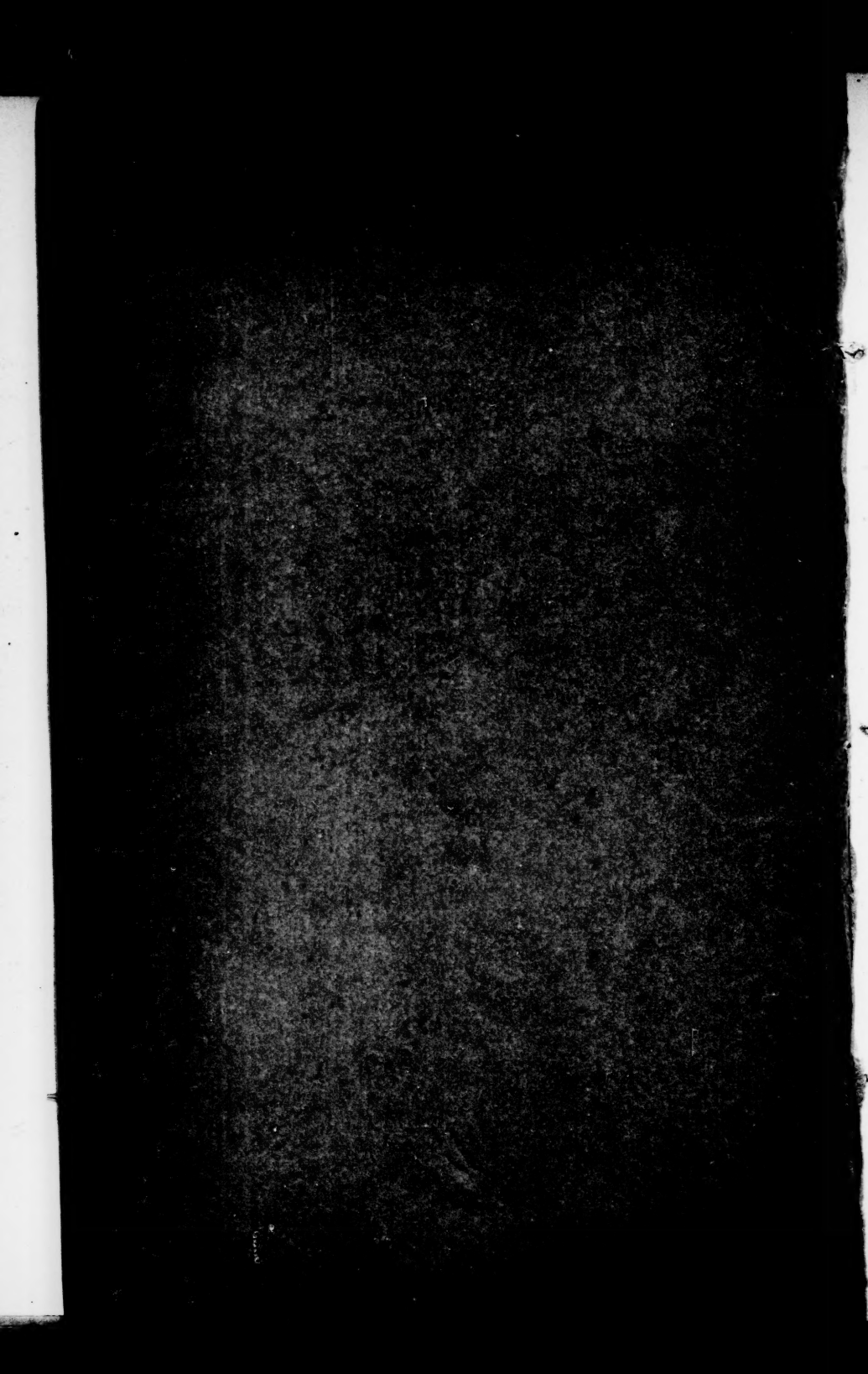
vs.

ALEXANDER TOPONCE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 14, 1890.

(14,276.)



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a In the Supreme Court of Utah Territory.

ALEXANDER TOPONCE, Plaintiff and Respondent,
vs.
CORINNE MILL, CANAL AND STOCK COMPANY, Defendant and Appellant. } No. 60.

Transcript on Appeal.

Messrs. Bennett & Bradley, attorneys for appellant; Messrs. Kimball & White, attorneys for respondent.
Filed Nov. 23, 1889.

JOS. P. BACHE, *Clerk.*

1 TERRITORY OF UTAH, } *ss:*
County of Weber, }

In the District Court, First Judicial District, Sitting at Ogden City.

ALEXANDER TOPONCE, Plaintiff,
vs.
THE CORINNE MILL, CANAL AND STOCK COMPANY, Defendant.

Complaint.

1. The plaintiff above named complains of the defendant above named, and alleges:

That the defendant is now, and was at all the times hereinafter alleged a corporation, duly organized and existing under and by virtue of the laws of the Territory of Utah, and engaged in business in said Territory.

That from January 1, 1883, to about the 1st day of December, A. D. 1887, the plaintiff was the vice-president and general manager of the defendant and in charge of its business.

That from the said 1st day of January, 1883, to and in-
2 cluding the 1st day of December, 1887, the plaintiff paid, laid out and expended for defendant, at its request, in and about its business divers and sundry sums of money, aggregating the sum of forty-eight hundred and eighty-two dollars and twenty-three cents ($4,882.23).

That said sum is now wholly due from defendant to plaintiff and remains wholly unpaid.

2. The plaintiff above named, further complaining of the defendant above named, and for a second cause of action, alleges:

That the defendant is now, and at all the times hereinafter alleged was, a corporation duly organized and existing under and by virtue of the laws of the Territory of Utah, and engaged in business in said Territory.

That defendant is indebted to plaintiff in the sum of eleven hundred and thirty-three dollars and twenty-five cents ($1,133.25), upon an account for feeding, caring for and keeping the horses and

stock of defendant at its request from January 15, 1883, to December 1, 1887.

That said sum is wholly due and wholly unpaid.

3. The plaintiff above named, further complains of the defendant above named, and for a third cause of action alleges:

That the defendant is now and at all the time hereinafter alleged, was a corporation duly organized and existing under and by virtue of the laws of the Territory of Utah, and engaged in business in said Territory.

3 That from January 1, 1883, to December 1, 1887, the plaintiff, at its request, rendered services to the defendant as its general manager.

That during all of said time he devoted all his time and attention to the business of said defendant.

That his said services were and are reasonably worth the sum of two hundred and fifty dollars per month, and were reasonably worth for the whole of said period the sum of fourteen thousand seven hundred and fifty dollars ($14,750).

That said sum is due from the defendant to plaintiff and remains wholly unpaid.

4. The plaintiff above named complains of the defendant above named, and for a fourth cause of action alleges:

That the defendant is now, and at all times hereinafter stated was, a corporation duly organized and existing under and by virtue of the laws of the Territory of Utah, and engaged in business in said Territory.

That on January 1, 1887, the defendant was indebted to Lea Owsley in the sum of one hundred and forty-three dollars and sixty-eight cents ($143.68), upon an account for work, labor and services done for defendant by said Lea Owsley, at its request, in and about its stock ranche prior and up to said January 1.

That on the ninth day of January, 1888, for value received, the said Lea Owsley sold, assigned and set over to plaintiff said account and indebtedness.

That said sum is wholly due and unpaid.

4 5. The plaintiff above named, further complaining of said defendant, and for a fifth cause of action alleges:

That the defendant is now, and at all the times hereinafter alleged was, a corporation duly organized and existing under and by virtue of the laws of the Territory of Utah.

That on January 1, 1888, the defendant was indebted to Lea Owsley in the sum of five hundred and eighty-one dollars and thirty-two cents ($581.32), a balance upon an account for board furnished to the employés of defendant, at its request, from December 1, 1884, to December 31, 1887.

That on the 9th day of June, 1888, the said Lea Owsley, for value received, sold, assigned and set over unto the plaintiff the said balance of account and indebtedness.

That the same is wholly due and unpaid.

Whereupon plaintiff demands judgment against the defendant for the sum of twenty-two thousand four hundred and twenty-four

dollars and fifty-six cents ($22,424.56), together with interest thereon at the rate of ten per cent. per annum from the date of filing this complaint, and for costs of suit.

KIMBALL & WHITE,
Attorneys for Plaintiff.

TERRITORY OF UTAH, }
County of Weber, } ss:

5 Alexander Toponce, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows its contents; that the same is true of his own knowledge, except as to the matters therein stated on information and belief; and that, as to those matters, he believes it to be true.

ALEX. TOPONCE.

Subscribed and sworn to June 9, 1888, before me.

[L. S.] WALLACE R. WHITE,
Notary Public.

Filed June 9, 1888.

H. H. HENDERSON, *Clerk,*
By A. H. DRAKE,
Deputy Clerk.

Title of Court and Cause.

Stipulation.

Defendant is given till and including August 2, 1888, to plead herein.

Dated July 2, 1888.

KIMBALL & WHITE,
Pl'ff's Att'ys.

Filed July 6, 1888.

H. H. HENDERSON, *Clerk.*
By A. H. DRAKE,
Deputy Clerk.

Title of Court and Cause.

Answer.

Answering the first alleged cause of action stated in the complaint, the defendant denies that from January 1, 1883, to about the 1st day of September, 1887, or that during or at any time,
6 the plaintiff was the general manager, or had the management or was in charge of the defendant or its business.

Denies that from January 1, 1883, to and including December 1, 1887, or during or at any time, the plaintiff paid or laid out or expended for defendant at its request or otherwise, in or about its business or otherwise, divers or sundry or any sums or sum of money aggregating the sum of $4,882.23, or aggregating any sum in excess of the credits allowed plaintiff on plaintiff's open running account

with defendant hereinafter alleged as a counter-claim, and denies that said sum alleged or any part thereof, or that any sum other than the sum in the fourth count stated in the complaint was or is now due from defendant to plaintiff or remains unpaid.

Answering the second alleged cause of action defendant denies that it is indebted to plaintiff in the sum of $1,133.25 or in any sum or amount, upon an account or any account for feed, hay or grain furnished or fed to any horses or stock of defendant at its request or otherwise from January 1, 1883, to December 1, 1887, or during or at any time, and denies that it made any such request, and denies that any such feed, hay or grain was furnished or fed to any horses or stock of defendant at its request or otherwise between said dates or at any time, and denies that it is indebted to plaintiff in any sum or amount, except only the amount alleged in the fourth count of the complaint, for or on account of any matter or thing, and de-
7 nies that said sum alleged or any part thereof or that any sum, except only said sum alleged in the fourth count of the complaint is due or unpaid.

Answering the third alleged cause of action, defendant denies that from January 1, 1883, to December 1, 1887, or that during or at any time, the plaintiff at the defendant's request or otherwise rendered services to the defendant as its general manager, or in any capacity or way entitling him to wages or pay, and denies that during all or any part of said time or that during any length of time he devoted or was requested or required to devote all his time or attention to the business of said defendant, or that he devoted any more of his time or attention than he agreed to devote free of cost to or charge against the defendant, and denies that his said services or any services of his were or are reasonably or at all worth the sum of $250, or any sum per month, or were or are for the whole or any part of said period or for any period of time or at all worth the sum of $14,750 or any sum or amount, and denies that said or any part of said sum, or that any sum, except said sum stated in the fourth cause of action alleged in the complaint, is due from defendant to plaintiff or remains unpaid.

Answering the fifth alleged cause of action, defendant denies that prior to or on January 1, 1888, or at any time the defendant was or is indebted to Lea Owsley in the sum of $581.32 or in any sum, a balance or otherwise, upon an account for any board fur-
8 nished—and denies that any board was furnished—to the employees or to any employee or employees of defendant or to any person or persons, at defendant's request, from December 1, 1884, to December 31, 1887, or for, during or at any time, and alleges that it has not information or belief sufficient to enable it to answer whether or not any board was at any time furnished to any employee or employees of defendant, and on that ground denies that any board was furnished to the employees or to any employee or employees of defendant from December 1, 1884, to December 31, 1887, or for, during or at any time; and the defendant denies that it is indebted to plaintiff upon any account or for any matter or thing except only on the fourth count alleged in the complaint, as by this

pleading admitted, and denies that on June 9, 1888, or at any time said Owsley, for value received or otherwise, sold or assigned or set over to plaintiff said or any balance of account other than the one alleged in said fourth count of the complaint and admitted by this pleading, and denies that the same or any part thereof, or that any sum except only the sum alleged in said fourth count of the complaint is due or unpaid.

And for a further defense and as a counter-claim defendant alleges: That on or about November 4, 1887, said Lea Owsley received to and for the use and benefit of defendant, from the sale and disposal by said Owsley of five horses belonging to defendant the sum of $200; that on June 9, 1888, and at the com-
9 mencement of this suit said Owsley refuses and has ever since said date refused and still refuses to pay and had not then and has not yet paid said $200 nor any part thereof to defendant. That on June 9, 1888, and ever since said date said sum was and still is due and payable to defendant by said Owsley.

And for a further defense and as a counter-claim herein the defendant alleges: That in and ever since the year 1883 up to about June 10, 1888, the plaintiff and said Lea Owsley were partners in the undivided ownership and possession of fifty-six head of cattle and their increase since 1883; that in 1883 the defendant and said partners made and entered into a contract, in which and whereby the defendant agreed to allow said partners to pasture said cattle and all their increase on defendant's lands in Box Elder county, Utah, from thenceforth for a length of time mutually satisfactory to the parties at the rate of twenty-five cents per head per month for the number of head pastured, to be paid defendant by said partners, which rate and amount per head per month for said pasturage said partners jointly and severally promised to pay to defendant; that during each month of the year ending December 1, 1885, defendant allowed said partners to and they did pasture on said lands said fifty-six head of cattle, and, on information and belief, that during each month of the year ending December 1, 1886, defendant allowed said partners to and they did pasture on said lands
10 ninety head of cattle, being said fifty-six head and their increase, and, on information and belief, that during each month of the year ending December 1, 1887, defendant allowed said partners to and they did pasture on said lands 171 head of cattle, being said fifty-six head and their increase, and, on information and belief, that during the months of December, 1887, and January, 1888, defendant allowed said partners to and they did pasture on said lands 299 head of cattle, being said fifty-six head and their increase, and, on information and belief, that the total value and amount of said pasturage from December 1, 1884, to February 1, 1888, was, at said agreed rate, $1,124.50, which as aforesaid said partners jointly and severally promised to pay to defendant.

That between said dates they paid defendant $414.40 on said contract. That they have not paid defendant any further sum or amount on said contract, and, on information and belief, that

at the commencement of this action there was and there is due and unpaid to defendant from plaintiff on the same the sum of $710.10. That defendant fully kept and performed all of the terms and conditions of said contract by it to be kept and performed.

And for a further defense, and as a counter-claim, the defendant on information and belief alleges: That prior to and on June 9, 1888, the plaintiff and said Lea Owsley were and ever since have been and are jointly and severally indebted to defendant for 203 head of horses, sold and delivered on account to said plaintiff
11 and Owsley jointly and severally, at their request, and of the reasonable worth and value of $125 per head, or $25,375 in all, which sum and amount said plaintiff and Owsley jointly and severally promised to pay defendant therefor. That said amount of $25,375 has not nor has any part of the same been paid to defendant, the same was prior to and on June 9, 1888, and ever since has been, and is due and payable to defendant from said Owsley and plaintiff jointly and severally.

And for a further defense and as a counter-claim herein defendant alleges: that prior to and at the commencement of this action the plaintiff was and still is indebted to defendant in the sum of $3,614.51, a balance upon an account for money loaned, paid out and expended to and for plaintiff and for goods and materials furnished to him, and for divers and sundry other items and matters of charge, all on open running current account and at plaintiff's request between January 27, 1883, and June 10, 1888. That said sum of $3,614.51 was, at the commencement of this suit, and is due from and unpaid by plaintiff to defendant, and no part thereof has been paid.

Defendant prays judgment, that plaintiff take nothing herein, for the aggregate amount of $710.10, due on said second counter-claim alleged and $25,375 due on said third counter-claim alleged, and $3,614.51 due on said fourth counter-claim alleged; that said sum of $200, due on said first counter-claim herein alleged, be offset
12 against said $143.68, alleged in the fourth count of the complaint, and the two demands deemed compensated so far as they equal each other, and for costs of suit.

BENNETT, KIRKPATRICK & BRADLEY,
Attorneys for Defendant.

TERRITORY OF UTAH, } ss:
Box Elder County, }

J. K. Fowler, being first duly sworn, on oath says: I am an officer, to wit, the secretary of the defendant herein. I have heard the foregoing answer and the same is true of my own knowledge, except as to the matters therein stated on information and belief, and, as to those matters, I believe it to be true.

J. K. FOWLER, *Secretary.*

Subscribed and sworn to before me July 31, 1888.

[L. S.] R. S. GUTHRIE,
Notary Public, Box Elder County, Utah.

Due service of a copy of the within answer admitted August 2, 1888.

KIMBALL & WHITE,
Pl'ff's Att'ys.

Filed August 2, 1888.

H. H. HENDERSON, *Clerk*,
By A. H. DRAKE, *Deputy Clerk.*

Amendment to Answer.

13 And for further separate answer to the first cause of action stated in the complaint, the defendant alleges that so much of said alleged cause of action as is made up of sums alleged to have been paid, laid out and expended prior to June 9, 1886, is barred by provisions of paragraph 1, of section 196, of the Code of Civil Procedure, passed and approved March 13, 1884.

And for a further and separate answer to the third cause of action stated in the complaint, the defendant alleges that so much of said cause of action as relates to and is made up of the alleged value of services alleged to have been rendered prior to June 9, 1886, is barred by the provisions of paragraph 1, of section 196, of the Code of Civil Procedure, passed and approved March 13, 1884.

BENNETT & BRADLEY,
Att'ys for Def't.

TERRITORY OF UTAH, }
Salt Lake County, } *ss:*

John W. Kerr, being duly sworn, says: I am an officer, to wit, president of defendant; have heard read the foregoing amendment to defendant's answer herein; same is true of my own knowledge, except as to the matters therein stated on information and belief, and, as to those matters, I believe it to be true.

JNO. W. KERR.

Subscribed and sworn to before me January 21, 1889.

[L. S.] WM. M. BRADLEY,
Notary Public, Salt Lake County, Utah Territory.

14 *Stipulation.*

Stipulated, that the foregoing amendment to defendant's answer may be filed herein, and that it shall stand and be considered as part of the original answer to the complaint in the case.

PLAINTIFF'S ATTORNEY.

January 22, 1889.

Due service of a copy of the within admitted January 22, 1889.

KIMBALL & WHITE,
Plaintiff's Attorneys.

Filed January 22, 1889.

H. H. HENDERSON, *Clerk.*

Title of Court and Cause.

Trial.

This cause came regularly on for trial, Messrs. J. N. Kimball and L. R. Rogers appearing as counsel for plaintiff and C. W. Bennett, Esq., for defendant. The following jury was called and sworn, to wit: J. C. Amstrong, Emory W. Soule, Thomas Slater, Thomas J. Wilson, Henry Taylor, Richard Dye, William Knight, W. N. Shilling, Jesse S. Brown, Michael Buckmiller, William Beatton and Joseph Perkins, Sr., good and lawful men, who, being sworn, sat to gether and heard the testimony of witnesses in part, and the further hearing hereof is continued until to-morrow morning at ten o'clock.

Done in open court March 4, 1889.

H. P. HENDERSON, *Judge.*

15 *Trial Concluded.*

The jury heretofore empanneled in this cause again came into court and heard the testimony of the witnesses to a conclusion, the argument of counsel and the instructions of the court and retired in charge of a sworn officer to the consideration of their —, and subsequently they returned into court and upon their oaths say:

"We, the jury, empaneled in the above-entitled action, find the issues joined therein in favor of the plaintiff and against the defendant, and assess the damages of the plaintiff at the sum of $11,339.56.

"W. N. SHILLING, *Foreman.*"

Thereupon the court ordered judgment to be entered in accordance with said verdict.

Done in open court March 9, 1889.

H. P. HENDERSON, *Judge.*

Special Verdict.

First.

—. Do you find the defendant is indebted to the plaintiff for money paid, laid out and expended by the plaintiff for the defendant, and at its request, as stated and alleged by the plaintiff in the first cause of action? And, if you do, how much of principal? And how much of interest thereon?

A. Principal, $3,195 13; interest, 248.45; total, 3,443.58.

W. N. SHILLING, *Foreman.*

16 Second.

Q. If you find anything due to the plaintiff on the first cause of action, do you include in it any part of the charge made by the plaintiff for money paid for traveling expenses, being the item charged in his bill of items at $1,300. And, if so, how much?

A. Yes; $70.

W. N. SHILLING, *Foreman.*

Third.

Q. Is the defendant indebted to the plaintiff upon an account for feeding, caring for and keeping the horses and stock of the defendant at its request, as stated in the second cause of action in plaintiff's complaint? If so, how much of principal and interest?

A. Principal, $218.25; interest, 16.89; 235.14.

W. N. SHILLING, *Foreman.*

Fourth.

Q. Is the defendant indebted to the plaintiff for services rendered by plaintiff as general manager, at the request of the defendant, as set forth in the third cause of action? And, if so, how much? State principal and interest separately.

A. Principal, $8,850; interest, 688.40; 9,538.40.

W. N. SHILLING, *Foreman.*

Fifth.

Q. How much is the defendant indebted to the plaintiff for services rendered by Lea Owsley to the defendant and assigned
17 by him to the plaintiff, as set forth in the fourth cause of action? Stating principal and interest separately.

A. Principal, $143.68; interest, 11.10; 154.78.

W. N. SHILLING, *Foreman.*

Sixth.

Q. How much, if anything, is the defendant indebted to the plaintiff for board furn'ed by Lea Owsley and assigned by him to plaintiff, as stated in the fifth cause of action? Stating principal and interest separately?

A. Principal, $581.32; interest, 45.16; 626.48.

W. N. SHILLING, *Foreman.*

Q. How much, if any, is the plaintiff indebted to the defendant upon open account, as stated in defendant's answer, as a counterclaim against the plaintiff? Stating principal and interest.

A. Principal, $2,467.02; interest, 191.80; 2,658.82.

W. N. SHILLING, *Foreman.*

Filed March 19, 1889.

H. H. HENDERSON, *Clerk,*
By A. H. DRAKE, *Deputy Clerk.*

Title of Court and Cause.

Verdict.

"We, the jury, empaneled in the above-entitled action find the issues joined therein in favor of the plaintiff and against the defendant and assess the damages of the plaintiff at the sum of $11,339.56.

W. N. SHILLING, *Foreman.*"

18 *Judgment on Verdict.*

Judgment on verdict in open court, 19th day of March, A. D. 1889.

This action came on regularly for trial. The said parties appeared by their attorneys, Messrs. Kimball & White and L. R. Rogers, counsel for plaintiff, and W. C. Bennett for defendant.

A jury of twelve persons was regularly empaneled and sworn to try said action.

Witnesses on the part of plaintiff and defendant were sworn and examined.

After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and, on their oaths, say:

"We, the jury, empaneled in the above-entitled action, find the issues joined therein in favor of the plaintiff and against the defendant, and assess the damages of the plaintiff at the sum of $11,339.56.

W. N. SHILLING, *Foreman.*"

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiff, Alexander Toponce, do have and recover from said defendant, The Corinne Mill, Canal & Stock Company, the sum of eleven thousand three hundred and thirty-nine dollars and fifty-six cents and
19 his costs and disbursements incurred in this action, amounting to the sum of three hundred and seven dollars and forty-five cents.

Judgment recorded the 19th day of March, A. D. 1889, in Book O, pages 437 and 438.

Title of Court and Cause.

Order Staying Proceedings.

On motion of C. W. Bennett, Esq., it is ordered that all proceedings in this cause be and the same are hereby stayed for sixty days from this day; and it is further ordered that defendant be and it is hereby granted sixty days from this day in which to prepare and serve statement on motion for new trial.

Done in open court, March 20, 1889.

H. P. HENDERSON, *Judge.*

Title of Court and Cause.

Notice of Intention to Move for New Trial.

To the plaintiff and his attorneys, Kimball & White:

You are notified that the defendant intends to and will move the court to vacate and set aside the verdict and judgment given and

rendered herein in favor of plaintiff and against defendant, and to grant a new trial of the action on the following grounds, to wit:

1. Irregularity in the proceedings of the jury by which defendant was prevented from having a fair trial, in this, to wit,
20 the acceptance of Juror W. N. Shilling, who on his *voir dire* swore that he did not sustain the relation of debtor to defendant, whereas in truth and in fact he did sustain such relation, and the fact was not discovered by defendant until too late to raise the objection.

2. Insufficiency of the evidence to justify the verdict and the judgment.

3. That the verdict and judgment are against law.

4. Error of law occuring at the trial and excepted to by the defendant.

The motion will be made on affidavits, and on a statement of the case, to be hereafter prepared and filed and served on you.

Dated March 26, 1889.

BENNETT & BRADLEY,
Attorneys for Defendant.

Due service of a copy of the within notice admitted March 27, 1889, after filing.

KIMBALL & WHITE,
Plff's Att'ys.

Filed March 27, 1889.

H. H. HENDERSON, *Clerk.*
By A. H. DRAKE, *Deputy Clerk.*

Title of Court and Cause.

Stipulation.

Defendant allows plaintiff herein ten days additional time
21 in which to prepare and serve amendments to the proposed statement on motion for new trial of this action.

BENNETT & BRADLEY,
Att'ys for Def't.

June 25, 1889.

Filed June 26, 1889.

H. H. HENDERSON, *Clerk.*

District Court, First Judicial District, Utah Territory, Weber Co.

ALEXANDER TOPONCE, Plaintiff,
vs.
THE CORINNE MILL, CANAL AND STOCK COMPANY, Defendant.

Statement on Motion for a New Trial, and also for Appeal.

This cause came on for trial before the court and a jury duly impaneled on the 14th day of March, 1889.

The following is the testimony given at the trial:

OGDEN, UTAH, *March 14th*, 1889.

LEE OWSLEY, called for the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. KIMBALL:

Q. Mr. Owsley, where do you live?
A. I reside at Corinne, sir.
Q. You know the plaintiff, Alex. Toponce?
A. Yes, sir.
Q. How long have you known him?
22 A. Well, eighteen years, sir.
Q. You knew him, then, from January 1st, 1883, down to the present time?
A. Yes, sir.
Q. Do you know what business, if any, he was engaged in from January, 1883, to the 1st of January, 1888?
A. Yes, sir.
Q. You may state what business?
A. He had charge of the Corinne Mill, Canal & Stock Co.'s business.
Q. In what particular part of the business?
A. He was foreman, general manager of that business.
Q. What business did the Corinne Mill, Canal & Stock Co. do?
A. Handling stock and lands; their principal business was in handling stock and lands.
Q. What kind of stock?
A. Horned stock, horses, cattle and so forth.
Q. To what extent were they engaged in the business of handling stock and raising stock?
A. They ranched stock for different parties; some years they had more or less on.
Q. Have any of their own?
A. Yes, sir; had a few.
Q. About how much stock did they have of their own?
A. They had sheep—I don't know the amount of sheep, exactly.
23 Q. Do you know about how many?
A. They had something between 10,000 and 11,000 sheep.
Q. What other stock?
A. Horse stock.
Q. How much land did they have?
A. Well, I couldn't state exactly the number of acres they had. They had seven miles by twenty miles. That is, they had alternate land sections.
Q. State whether or not you were in the employ of that company during the time you have mentioned.
A. Yes, sir.
Q. From what time?
A. From July, '83.

Q. You say that Mr. Toponce had charge of their business?
A. Yes, sir.
Q. Of what part of their business?
A. He was handling the ranch, what was called Toponce's ranch; he was general manager there and also had charge of the land and everything. He was the general foreman.
Q. Were you acquainted with John W. Kerr?
A. Yes, sir.
Q. What connection, if any, did he have with the company during that time?
A. He was a partner of Mr. Toponce; that is, he was president, I believe.
24 Q. Have you ever had any talks with him with reference to the business of the company?
A. Yes, sir.
Q. What, if anything, has he said about being the president of the company?
A. He told me — was president of the company.
Q. By whom were you first employed on that ranch in '83?
A. By Mr. Kerr and Mr. Toponce; they was both present.
Q. What business were you employed in?
A. I was to take charge of the ranch and handle the stock.
Q. Did you have all the land?
A. No, sir; what is known as Toponce's ranch.
Q. Where is that located?
A. It's twenty-two miles north of Corinne by the road.
Q. Where did you reside?
A. I resided on the ranch?
Q. You had individual charge of the ranch?
A. Yes, sir; I did.
Q. Subject to whose supervision, if any one's?
A. Mr. Toponce, sir.
Q. And Kerr and Toponce made that employment, originally?
A. Yes, sir.
Q. After that employment was made did you have any talk with Mr. Kerr about this subsequently?
25 A. Yes, sir.
Q. State what that was?
A. Mr. Kerr told me whatever arrangement or understanding I had with Mr. Toponce was agreeable to him.
Q. What did he say about Toponce running that business?
A. He said Mr. Toponce had full charge of the business.
Q. Had they other men in their employ during that time?
A. Yes, sir.
Q. Do you know how long Mr. Toponce was connected with that company in the capacity of a manager?
A. He was connected with the company from July, '83, to, I think, '87.
Q. Do you know about what character of service it was he rendered?
A. He was general foreman from the time I came on the ranch.

Q. Well, what did he have to do?

A. He had general charge of everything—land, cattle, ranch and everything.

Q. What, if anything, did he have to do with the men and the stock on the ranch during that time?

A. Well, he made all contracts of everything that came on the ranch. I handled them under his jurisdiction—under his orders.

Q. That include the stock there?

26 A. Yes, sir.

Q. What, if anything, did he have to do with collecting the ranch bills?

A. He had everything to do with it. I was subject to his orders at all times.

Q. How was it with regard to the other men in the employ of the company?

A. The other men worked under me, subject to his orders; under my orders under him.

Q. Do you know who, if any one, during that time had supervision over the sheep herds?

A. Mr. Toponce, he had from '83 up to '86, I think, I can't say positive, but I think he was up to that time, he had full control of the sheep.

Q. What did Mr. Kerr know, if anything, about his exercising this control over the ranch and over the business of the company?

A. Mr. Kerr, whenever I referred to Mr. Kerr in any way he always referred me to Mr. Toponce. He says, "Go to him. He's the man that's looking after this business. I've got nothing to do with it."

Q. Was that at the time Mr. Kerr was president of the company?

A. Yes, sir.

Q. To whom were your accounts rendered for services?

A. My orders was to render my accounts to Mr. J. K. Fowler as secretary.

27 Q. By whom, if any person, did it have to be approved?

A. Mr. Toponce. He had to acknowledge my accounts and they were all——

Q. You spoke of J. K. Fowler. What connection, if any, had he with the company during the time you speak of?

A. He was book-keeper, sir, and the cashier or secretary of the company, sir.

Q. What, if anything, did he know about Toponce's management, and what was he doing for the company?

A. All orders, anything that Mr. Toponce gave, he would write them himself and then he would sign his own name. Mr. Toponce's orders to me.

Q. Do you know what business Toponce had charge of?

A. He had charge of the ranch.

Q. I asked you if Fowler knew?

A. Yes, sir; he did.

Q. Where did Fowler live during that time?

A. He resided in Corinne.

Q. Where did Toponce live?
A. He resided in Corinne also.
Q. Do you know of any property being sold from that ranch during the time you speak of?
28 A. There was some few horses sold, yes, and some lamb and some sheep; but, with regard to the sheep, I had nothing to do with that. I never kept any account of them.
Q. Who negotiated, or had charge of making those sales?
A. Mr. Toponce.
Q. You know that of your own knowledge?
A. Yes, sir.
Q. During the time you resided on the ranch, you say there were other men working there?
A. Yes, sir.
Q. Where did those other men board?
A. They boarded with me.
Q. At your house?
A. Yes, sir.
Q. State what, if any arrangement you had with the company with reference to that.
A. I made a contract with Messrs. Kerr and Toponce. They would pay me a salary and so much if I boarded the men. Twenty-five cents for boarding the men.
Q. How long did that continue?
A. From July 8, '83, up till '87.
Q. Men board with you all that time?
A. Yes, sir; more or less. Sometimes more and sometimes less, men on the ranch.
Q. You kept an account of that, did you?
A. Yes, sir.
Q. State whether the company has ever paid you in full for the board of those men?
29 A. They have not paid me in full; they gave me credit for some of it.
Q. At the commencement of this suit, on or about June 9, 1888, what sum, if any, was due from the company to you for the board of the men?
A. They owed me something over seven hundred dollars.
Q. I mean for board?
A. Oh! five hundred dollars, according to the best of my knowledge. This is a copy of my board account as the company told me to give it in, monthly, right along.
Q. How much was due you in June, if anything, for board?
A. Five hundred and seventy-eight dollars—no five hundred and eighty-one dollars, I should say.
Q. Anything else?
A. They owed me for wages.
Q. Whose signature is that to the assignment?
A. That is mine, sir.
Q. When was it executed?
A. June 9, 1888.

Q. To whom did you deliver it after its execution?
A. Mr. Toponce.
Q. What part of that has been paid to you?
A. No part of that has been paid to me.
Q. Did you ever present that bill to the company?
A. Yes, sir.
30 Q. When?
A. Monthly right along, I presented it to them.
Q. You presented it each month up to the time you left their employment?
A. Yes, sir.
Q. When was that?
A. I quit January, 1888.
Q. To what particular person did you render those accounts?
A. I rendered them to Mr. Toponce, through Mr. J. K. Fowler and to Mr. John W. Kerr.
Q. How were those accounts kept by you?
A. I was ordered to keep a monthly account by each man in regard to the board, and each man signed his name right under it, according to the number of meals he got.
Q. You kept such a book?
A. Yes, sir.
Q. Where is that book?
A. I have it right here.
Q. And this account you rendered, you say, was taken from that book?
A. Yes, sir.

Mr. KIMBALL: I offer this book in evidence.
Mr. BENNETT: No objection.
The COURT: It may be received.
Marked Plaintiff's Ex. A., P. E. K.

Mr. KIMBALL: This is the account of Mr. Lee Owsley
31 which is the fifth cause of action stated in the complaint for five hundred and eighty-one dollars for board with an assignment of this account to Mr. Toponce.

Mr. KIMBALL to the witness:

Q. Mr. Owsley, what, if anything, do you know about Mr. Toponce having furnished grain and feed for horses and stock of the defendant from January 15, '83, to December 1, '87?
A. Yes, sir.
Q. State what, if anything, you know about that?
A. Mr. Toponce ordered me to get up some colts, some thirty-six head in a bunch, and wean them and take them up and feed them for the winter.
Q. Where was that done?
A. In Corinne, sir.
Q. In Corinne town?
A. Yes, sir.
Q. What other stock had he there?

A. I had a band of horses out on the range there.
Q. What, if anything, do you know about having furnished feed, hay and grain for feeding?
A. Yes, sir. He furnished what hay and grain was there at that time.
Q. Who furnished the place where they were kept?
A. Mr. Toponce. We rented the barn from John W. Guthrie.
Q. Whose stock were those?
A. Corinne Mill, Canal & Stock Co.
32 Q. What, if anything, did Mr. Kerr or Mr. Fowler know about their being there and being fed?
A. Mr. Kerr came into the barn where they were being fed, and Mr. Fowler saw them also.
Q. How much grain, hay and feed was furnished?
A. I can't state positively. There was a band of young colts that we got up—32 head. I couldn't state positively how much they did consume. I couldn't state for I never kept no great account of it.
Q. How long did those colts remain up there?
A. Something over three months, sir.
Q. How many head did you say there were?
A. We got up at first thirty-six head, but the main number was twenty-six head, sir—that is, that we fed clear through the winter.
Q. Were there any other horses kept in that barn?
A. Not in that barn. We had another barn where we kept horses—saddle horses and driving horses.
Q. Whose barn was that?
A. That was known as Mr. Toponce's barn, sir.
Q. Were those horses fed?
A. Yes, sir.
Q. For how long a time?
A. During the winter.
Q. Whose horses were they?
A. They were the company's horses.
Q. Corinne Mill, Canal & Stock Co.'s?
A. Yes, sir.
33 Q. Who furnished the feed for those?
A. Mr. Toponce furnished the feed for the stock.
Q. There was a team of horses kept in the barn all toe time?
A. Yes, sir; and also my saddle horses.
Q. That is not only in the winter time but also in the summer time?
—. ——.
A. Who furnished the feed during that time?
A. Mr. Toponce furnished the feed.
Q. Do you know anything about how much he furnished?
A. No, sir; I couldn't state.
Q. He furnished some each year?
A. Yes, sir.
Q. During the whole time?
A. Yes, sir.
Q. Were there any stallions kept in that barn at Corinne?

A. Yes, sir.

Q. When were they kept there?

A. They were kept there during the winter of '83 and '84, and also during the winter of '85 and '86.

Q. They were kept up all the time?

A. Yes, sir.

Q. Who furnished the feed for those?

A. Well, Mr. Toponce, as general manager, furnished the feed for the stock.

Q. Now, you have already stated about what was the character of the services rendered by Mr. Toponce, do you know how long he was in that employment?

34 A. I came in the employment of the Corinne Mill, Canal & Stock Company on the 8th day of June, 1883, and I was in their employment until January, a year ago, and Mr. Toponce had full control of everything from the time I came till that time, sir.

Q. How long have you been engaged in the ranching business?

A. I have worked for Mr. Toponce twelve years.

Q. Well, before you went to work for them?

A. I worked for him eight years before they formed the partnership.

Q. Have you worked for any other person than them?

A. Not since I have been in this country.

Q. Can you state what Mr. Toponce's services were reasonably worth per month for the time he was employed there?

A. Well I would consider his services well worth $1,500 a year anyway and expenses.

Q. And his expenses?

A. Yes, sir.

Q. You think that is the least they would be worth?

A. Yes, sir.

Q. What would they be reasonably worth per month?

A. Well, under the circumstances, you couldn't get a man to do that for less than $250 a month.

Q. Would that be a reasonable sum?

35 A. It would under the circumstances, with everything situated as it was when I was in the employ of the company.

Cross-examination.

Examined by Mr. BENNETT:

Q. At the time you went to work for the company in July, '83, did you know that Toponce was a director of the company?

A. No, sir; I didn't know whether he was or not when I came.

Q. Well, you know now that he was at that time?

A. Yes, sir.

Q. And was up to December, 1887?

A. No, I don't know that he was.

Q. When you took employment from the company in the year of 1883, where were you stationed?

A. I was stationed at what is known as Toponce's ranch.
Q. And that is how far from Corinne?
A. That's twenty-two miles by the wagon road.
Q. Is that called the home ranch sometimes?
A. Yes, sir.
Q. And what were your duties there?
A. Take charge of all horses and cattle that were delivered to the ranch and also tend the company's stock.
Q. Sheep included?
A. No, sir, I had nothing to do with the sheep.
36 Q. How long had you been employed with Toponce before this?
A. With Toponce, Kerr & Co. for eight years before.
Q. I understood you to say that Toponce was general manager after the time you went there?
A. Yes, sir.
Q. After '83?
A. Yes, sir.
Q. How do you know that?
A. Mr. Kerr told me so. Mr. Kerr told me that any information or any reference I wanted in regard to the handling of stock on the ranch I was to refer to Mr. Toponce, and that I was to work under his orders.
Q. Where did he tell you that?
A. Right at the ranch.
Q. When?
A. On July 9, 1883.
Q. You're sure about the date?
A. Yes, sir.
Q. How?
A. For that was the date I went to work for the company, sir.
Q. Kerr was at Corinne?
A. He was, sir.
Q. Was Alex. there?
A. Yes, sir. They were both right there at the same time. Both in person.
Q. What line of work did you first undertake?
37 A. I took general care of the ranch, sir.
Q. You occupied the house on the home ranch?
A. Yes, sir; with my family.
Q. You occupied the barn and all the——
A. Yes, sir; occupied the entire ranch.
Q. Did you then know that Alex. was a director of the company?
A. I did not.
Q. When did you find that out?
A. I didn't find it out for two or three months after. I was ordered to work under his instructions.
Q. How much of the time did Alex. spend on the home ranch?
A. Well, he come there off and on, sometimes twice a week, sometimes every day in the week, sometimes it would be a week or two before he would get there.

Q. He simply had general charge of the business?

A. He simply had general charge of the business, and I was working under his orders.

Q. Did you ever take any orders from Kerr?

A. No, sir.

Q. Why not?

A. Simply because he told me — had nothing to do with the business. He always referred me to Mr. Toponce for my orders.

Q. When were these colts stabled at Corinne?

A. Well, I suppose 26 colts was stabled at Corinne.

38 Q. When was that?

A. Three years ago this last winter, sir.

Q. That would be the winter of '84 and '85?

A. Yes.

Q. Were they stabled in the company's stables?

A. No, sir.

Q. You say that Toponce furnished the feed for them?

A. Yes.

Q. How do you know?

A. He was general manager of the business, and he bought the feed and hay and grain for the colts and I was handling them under his orders.

Q. How do you know he bought the hay and grain?

A. It was there for me to handle.

Q. I'll ask you how you know Toponce furnished it?

A. He ordered it and it was hauled and delivered there.

Q. Do you know that?

A. Yes, sir.

Q. Did you ever hear him order any?

A. Yes, sir.

Q. From whom?

A. From different parties.

Q. From whom?

A. Mr. Hadley.

Q. How much?

39 A. I couldn't state.

Q. How much did Alex. order from him? Were you present at the time the order was made?

A. He ordered it at intervals. We'd probably get five tons at a time and a thousand pounds of grain. It wasn't ordered from one person entirely all of it.

Q. I'm confining you now to the order given Mr. Hadley. How much did Alex. order in your presence?

A. I couldn't state; two or three tons. As much as two tons, anyhow.

Q. You can't state just what Alex. said to Mr. Hadley in your presence?

A. He says to him, Mr. Hadley—he was in the habit of delivering hay over there in Corinne to the Promontory——

Q. I don't ask you at all about that. I want you to say what Alex. said to Hadley in ordering hay in your presence.

A. Well, he said to Mr. Hadley, "I'd like to get some hay from you. Can you bring me over a couple of tons?"

Q. When was that?

A. The same winter we was feeding the colts.

Q. Was it early in the winter or what time in the winter?

A. I couldn't state the exact day or date.

Q. Did he order grain at that time?

A. Yes. He ordered grain there——

40 Q. No; I am confining you to the one time you were present when Alex. ordered hay from Hadley. Did he order grain at the same time?

A. He didn't from Hadley.

Q. Were you ever present on any other occasion when Alex. ordered hay or grain from Hadley?

A. No, sir.

Q. How much hay did he order then?

A. He ordered some two or three tons.

Q. Is that the nearest you can state from Mr. Hadley?

A. Yes, sir. That's the nearest I can state from Mr. Hadley.

Q. Whose colts were these?

A. They belonged to the Corinne Mill, Canal & Stock Co.

Q. And Alex. ordered the hay for them?

A. Yes, sir.

Q. You don't know if it was on his account?

A. I supposed it was company. I never asked any questions. I was only a hired man.

Q. Now, can you be at all certain about when the colts were brought into the barn to be stabled in Corinne?

A. Well, I can't give you the exact date. I think it was some time in November.

Q. Of what year?

A. It was in the fall of '85, I ain't sure.

Q. And the colts remained there how long?

41 A. I fed them thorough the winter. They was suckling, yearling colts. Mr. Toponse ordered me to get up a certain amount of suckling colts, that was sucking their mothers, and wean them away from their mothers; and put them into a barn and take care of them, and ween them from their mothers; and feed them grain and get them halter broke, and also some young stallions, which I did.

Q. I understood you to say that later some horses were brought up and stabled at Corinne?

A. Not in the stable where these colts was. They was in what is known as the Toponce barn, where I had my horses and the team.

Q. You had a separate barn from the company's barn?

A. Yes, sir.

Q. Did you state the feed for those animals was furnished by Alex.?

A. Yes, sir.

Q. From whom procured?

A. I couldn't state that. Got from different parties. I don't know who it was bought from.

Q. All you mean to say, then, I suppose, is, that Alex., being manager, procured the feed?

A. Yes, sir.

Q. You know that he procured it on his own account, but for the company?

A. Yes, sir. I know the feed and everything was there for me to use it and to do the work.

42 Q. Did you render an account to the company for the board bill you have now sworn to?

A. Yes, sir.

Q. When?

A. Monthly, right along.

Q. Up to what time?

A. Up to '87.

Q. Did you render to the company any vouchers showing the facts as to the board?

A. My contract with the company with regard to the board bill was, I was to make it out for every man's board and he was to sign it. If it was only for a meal he was to sign it.

Q. You never showed it to Fowler?

A. Yes, sir.

Q. Is it not the fact that your account was not paid or allowed because you did not furnish vouchers?

A. That was the boarders——

Q. Answer my question.

A. Well, my contract was with the company, when I went to work for them——

Q. Answer my question.

A. Vouchers?

Q. Yes.

A. Well, I was stating my understanding; when I went to work I didn't require any vouchers according to my contract. According to my understanding with Mr. Kerr and Toponce they

43 stated to me in person they would give me so much salary a year, and they would give me so much for boarders apiece.

The COURT, to the witness:

Q. You don't understand the question, I guess. Now you pay particular attention to what he asks you. He asks you if they didn't refuse to pay your bill because you didn't furnish the proper vouchers. You know what that is?

A. Yes, sir.

Q. Something to show you had rendered the services?

A. Yes, sir.

A. But that was what I stated. I——

Q. No, no; answer the question first.

A. Well, my vouchers was to have each and every man sign——

Mr. BENNETT, to the witness, interrupting:

Q. I don't care about that; isn't it the fact that they refused your bill because you did not produce vouchers?

A. Yes, after three years I had been on the ranch. After I had been there, and boarded the men three years; but they accepted my account for the two years and previous to that time.

Q. Well, you presented vouchers at the first, didn't you?

A. Only according to my contract. I presented my books just as they told me to make out my books. Each man that got one meal or two meals I had him sign his name under it; that was my voucher.

44 Q. But you didn't present that voucher for the last bill?

A. I have my book here.

Q. That isn't the question now. Did you present it for the bill you have now assigned to Alex. Toponce?

A. Yes, sir.

Q. When?

A. Right along.

Q. To whom?

A. Mr. Fowler. After I had been in the employ of the company two years and a half Mr. Fowler objected to putting my account on the books.

Q. What is the last item on your bill there—what date? When was that bill made out?

A. That was made out about a year ago. This is only a copy from the account.

Q. Where was it made out?

A. In Corinne City.

Q. By whom?

A. Mr. J. K. Fowler.

Q. When?

A. Last fall.

Q. What was the last item of that of board? For what month?

A. May 6, '86; then there is a month in '87, sir.

Q. What date is that '87 item?

A. November 2.

Q. Do you remember rendering that bill to the company?

45 A. Yes, sir.

Q. Did you have your vouchers then?

A. I rendered my bill according to my instructions, but Mr. Kerr objected to giving me any vouchers after the last year and a half. He referred me to Mr. Toponce. He said he would settle my account.

Q. Didn't he say it must be O K'd by Mr. Toponce?

A. He said if I would bring my bills to him O K'd he would settle them.

Q. And you didn't have them O K'd?

A. I had some of them O K'd and they wouldn't acknowledge me.

Q. They wanted the bills O K'd and you refused to do it?

A. I O K'd some of them and they refused to acknowledge them.
Q. Were you living at the ranch at that time.
A. Yes, sir.
Q. That was after Mr. Kerr knew, and the officers knew that you had filed on the ranch, wasn't it?
A. Filed on the ranch?
—. Filed on the ranch, yes, sir.
A. What ranch?
Q. The home ranch?
A. I never filed on the home ranch.
Q. What?
A. There's a hundred and sixty acres I filed on, the remaining part of the section.
46 Q. What?
A. Yes, sir.
Q. You didn't file on the home ranch?
A. No, sir, I did not.

Redirect examination.

Examined by Mr. KIMBALL:

Q. Have you that book here?
A. Yes, sir.
Q. This is the book you kept your board on?
A. Yes, sir. There's the way they authorized me.
Q. Who wrote that on there?
A. J. K. Fowler.
Q. Whose signature is that?
A. Mr. J. K. Fowler's signature.
Q. At the time you presented this bill last fall did you show this book to Mr. Fowler?
A. Yes, sir.
Q. You took that book down with you?
A. Yes, sir.
Q. And it was then as it appears now, was it?
A. Yes, sir, just as it appears now. There's some bills more made out by Mr. Fowler.
Q. Where did he make those from?
A. He made them in Corinne from this book, sir.

Mr. KIMBALL: I offer this book in evidence with the statement of J. K. Fowler on the front page.

Mr. BENNETT: I object, as immaterial and incompetent.
47 The COURT: In explanation of this testimony, I think it should be received.

Exception by defendant.

Mr. KIMBALL: "All men who get meals must sign their names and have an order, or be know- to you as company men.

J. K. FOWLER, *Secretary.*"

Mr. KIMBALL: I offer in evidence pages seven, eight, nine and ten of this book.

Mr. KIMBALL, to witness:

Q. What *are* become of the pages of this book prior to page seven?

A. I have it here; they are made out on bills by Mr. J. K. Fowler.

Q. How did he come to make them out in that shape?

A. He made them out from pages I had of a similar book.

Q. Now, that is not an answer to my question. Where are the pages from one to seven?

A. I have them here.

Q. That isn't a page of that book.

A. This is a duplicate of the pages that belong there?

Q. Where are the pages that belong there?

A. I used them. When I would go down a horseback, I used to tear it out, and Mr. Fowler would take a copy off of that.

Q. You*r* would tear out the pages and take them down to him?

48 A. Yes, sir. My business was horseback, and I would tear the pages out and put them in my pocket.

Q. Where are pages three, four, five and six?

A. I have them at home.

Q. Who made this duplicate copy for you?

A. Mr. J. K. Fowler.

Mr. KIMBALL: I offer these in evidence.

Mr. BENNETT: I object, as immaterial and incompetent.

The COURT: Mr. Fowler was the secretary of the company?

A. Yes, sir.

Q. Is this in Mr. Fowler's handwriting?

A. Yes, sir. And taken from the pages of that book.

The COURT: Mr. Kimball, do you introduce it as a book account?

Mr. KIMBALL: I introduce it to show he presented vouchers for this account.

The COURT: For that purpose it may be received.

Exception by defendant

Cross-examination.

Examined by Mr. BENNETT:

Q. Had you a smaller book?

A. Yes, sir. I have a smaller book.

Q. You haven't produced that?

A. That is the only book I kept.

Q. You had another book?

A. No; this is the only book I have at all.

49 Q. I understood you to say you had a smaller book.

A. Well, when I was away, my wife had a memorandum book she used for the boys when they came in.

Q. Connected with this business?

A. Yes, sir.

Q. And that was a portion of this account and showed a portion of this business?

A. They was all put onto this book.

Q. Have you this book with you?

A. No, sir.

Q. Can you produce it in time for this trial?

A. I could, probably.

Q. Why didn't you bring it?

A. It didn't think it was necessary. This is a full statement. When I was off away from home——

Mr. BENNETT: I move to strike out the evidence of this book and these sheets, on the ground that the full account is not shown. One book of original entry, by the admission of the witness, is not here, not offered.

The COURT: I understood him to say that the account was kept on this little book when he was away, and then transferred and signed on this book.

Mr. KIMBALL to witness:

Q. I understood you to say that those accounts were kept on the small book and subsequently transferred to this book and signed by the men?

A. Yes, sir.

The COURT to the witness:

50 Q. This book was signed by the men always?

A. Yes, sir.

The COURT: I'll deny the motion now.

Mr. BENNETT: Note an exception.

ALEXANDER TOPONCE, called for plaintiff, being duly sworn, testified as follows:

Examined by Mr. KIMBALL:

Q. You are the plaintiff in this action, Mr. Topo-ce?

A. Yes, sir.

Q. You are one of the members of the Corinne Mill, Canal & Stock Co., are you?

A. Yes, sir. I acted as such.

Q. I asked you if you were one of the members of the company.

A. Yes, sir.

Q. How long were you connected with the company in business?

A. Ever since it was organized.

Q. When was that?

A. That was in January, '83.

Q. To what time?

A. Up till December 20, '87, I think.

Q. Who were the officers of that company during that time?

A. John W. Kerr was president, I was vice-president, J. K. Fowler was secretary and treasurer, and D. H. Spencer, Sr., and I. H. Fowler were directors; we made the company up; there was five of us.

51 Q. You and Mr. Kerr and Mr. Fowler were directors as well as officers?

A. Yes, sir.

Q. What was the business of that company?

A. Well, they run a grist mill, bought and sold land, raised horses and sheep and had a few cattle.

Q. Any other business?

A. No, except running the grist mill, digging some ditches, and fencings.

Q. What, if anything, did they do about taking stock from third persons or strangers?

A. Yes, they took stock to pasture.

Q. About how much land had that company?

A. Well, I think they had nearly 80,000 acres at one time.

Q. How much did they have during the time you were connected with the company?

A. I think the company has now left—they had that much and we sold some off to Mr. Walker of Salt Lake, some to Mr. Roach and some other parties till we reduced it down to about sixty thousand acres.

Q. Do you know the ranch where Mr. Owsley lived?

A. Yes, sir.

Q. Who had charge of the business of that company from January 1, '83 to '87?

A. I did.

Q. Well, now, state what part of the business you had charge of and what you did?

52 A. I had charge of the entire business, had charge of the land, sold and purchased the land, purchased horses and sold them, sold land and done everything.

Q. Who had charge of the employment and supervision of the men on that ranch?

A. I had charge of the men on the ranch, and Mr. Owsley was foreman on the ranch.

Q. All of the men, I understand you, were under your control?

A. Yes, sir.

Q. Who employed and discharged the men?

A. I did, excepting the foreman. The foreman could discharge of the men.

Q. Who employed the foreman?

A. I did. I think Mr. Kerr employed the first foreman we had over the sheep.

Q. Who was he?

A. I think the first foreman Mr. Kerr employed for the sheep.

That was a man by the name of Steele; he was foreman of the sheep for Mr. Kerr. He staid with us something like a year, managing the sheep, and then Mr. Kerr discharged him or he quit and he hired a man named Mr. Morris.

A. At whose request, if any one, did you perform the services of manager of that business?

A. At Mr. Kerr's request.

Q. He was president of the company?

A. He was president of the company; we owned all the stock excepting seventeen shares.

53 Q. What, if anything, did he know about your having performed the services of buying and selling land, taking care of the stock?

A. He knew all about it.

Q. Who, if any person, made contracts with people who brought stock there to be pastured and ranched?

A. Me and the secretary here. We'd go to the office, generally, and he'd draw up the contract.

Q. Outside of the written contract, who did the work?

—. ——.

Q. Who did the collecting?

A. Sometimes I did and sometimes the secretary. He'd make out the bill.

Q. How much of your time from January 1, '83, to December 1, 1887, did you put in for the company?

A. All of the time with the exception of one month, and I was in Wood River ten days, I think, on my own business.

Q. With the exception of the month and ten days, you devoted all of your time to the company?

A. Yes, sir.

Q. You had no private business?

A. I done no business for myself.

Q. Where was Mr. Kerr during this time?

A. Sometimes he was in Salt Lake and sometimes in Corinne.

Q. Where did you live during that time?

A. I lived in Corinne.

54 Q. Where did Mr. Kerr live?

A. Sometimes in Corinne and sometimes down in Salt Lake.

Q. What, if anything, have you been paid for your services during the time that you have mentioned, from January 1, '83, to December 1, '87?

A. I've never been paid anything except for selling some land, which was for a contract of commission. I never received a cent for any services outside of that.

Q. What land was that?

A. Walker Brothers' land, Walker Brothers' land, and some to Mr. Daly, and Mr. Miller and some other parties.

Q. You may state what your services were reasonably worth per month during the time you were engaged there.

A. I consider my services reasonably worth $300 a month. I

used to work for Mr. Kerr for $275 a month, and he paid that much to me, and paid my expenses.

Q. State what occasion there was, if any, for your traveling during the time you were transacting the business for the company.

A. I have traveled to Salt Lake City, where some of this property was sold, to Wyoming where the sheep was, down to Salt Lake fighting lawsuits.

Q. Where?

A. Here at Ogden, fighting lawsuits in this court.

Q. How did you travel, principally?

55 A. Principally by trains, but when I couldn't go by train I'd get a team.

Q. About what amount of money, if any, did you expend in railroad fare and travel?

A. Well, it's pretty hard to tell. Sometimes I would be down here four or five times a week. I'd go up in the evening and go up to the ranch and then get back in the morning.

Q. Did you keep any account?

A. No, sir. Unfortunately I never was scholar and never could keep count unless I kept it in my head.

Q. Did you keep it in your head?

A. I kept it as near as I could. I can't say what it would be.

Q. Can't you say what amount?

A. Sometimes I would take a trip down here and it would cost me $15 or $20.

Q. During the whole time what amount of money did you expend for travel?

A. I don't think I could say exactly what amount.

Q. You made out this account against the company, did you not?

A. Yes, I had it made out.

Q. Can you, by referring to that, tell about what amount you expended?

A. As near as I can recollect, unless you showed me——

Q. You made out this account, or had it made?

A. I had it made.

56 Q. Can you refer to that and tell?

A. Yes, $1,300.

Q. You think that account is correct?

A. Yes, I think I charged, as near as I can recollect, $300 a year for all expenses.

Q. And you were there four years?

A. Four years—nearly five years.

Q. You charged at the rate of $300 a year?

A. Yes, sir.

Q. This item of $1,300 in your account is correct, then, is it?

A. Yes, I think it is.

Q. Now, what other money did you pay out and expend, if you know?

A. I expended a great deal of money on lawsuits.

Q. Where were those lawsuits?

A. The greater portion of them was against William Johnson.

Q. By whom?
A. The Corinne Mill, Canal & Stock Co.
Q. Did you pay out any money in those cases?
A. Yes, sir.
Q. For what?
A. I paid money out for attorney's fees, and court fees, and witness fees.
Q. Whose money was that you paid out?
A. Out of my own money.
57 Q. What, if anything, did the company or any other officer of the company know about your having paid out this money?
A. They all knew it.
Q. How did they know it?
A. Why, from the fact that they received some of the money that was won on those lawsuits.
Q. What did they know about paying for it?
A. They didn't know anything about it till I paid it out and demanded the pay for it.
Q. Can you tell to whom you paid those sums of money?
A. I paid Kimball & Heywood, Mr. Varian.
Q. The items as found in this account?
A. Yes, sir. I think so. I think I've got vouchers for them. I paid Mr. Loveland some.

Mr. KIMBALL to Mr. Bennett: Mr. Bennett, have you that account I rendered you?
Mr. BENNETT: No; Mr. Marsh left it at his house.
Mr. KIMBALL: I want to introduce this letter-press copy of it.
Mr. BENNETT: All right.
Mr. KIMBALL: I offer this in evidence.
Mr. BENNETT: I object, as immaterial and incompetent.
Mr. KIMBALL: I expect to follow it up with proof of each item, but I want to refer to it.
The COURT: You may use it for reference.

Mr. KIMBALL, to the witness:

Q. Who made out this account?
58 A. Mr. White, I think.
Q. There is an item here of December 23, 1886, paid C. S. Varian for professional services, $220. Do you remember what that was paid for and who paid it?
A. Yes, sir. One of the Johnson cases.
Q. Who paid it?
A. I did.
Q. Who did you pay it to?
A. Mr. Varian himself.

Mr. KIMBALL to reporter: Mark this Exhibit C, then.
Mr. KIMBALL: I offer in evidence statement of account made by Mr. Varian against the Corinne Mill, Canal & Stock Co., showing a credit in his handwriting, by cash, Toponce, $220.

The COURT: It may be received.
Mr. BENNETT: That is Mr. Varian's handwriting.
Paper marked Plaintiff's Ex. C., P. E. K.

Mr. KIMBALL, to the witness:

Q. You paid that to Mr. Varian?
A. Yes, sir.
Q. And on the date, December 23d, that is here credited?
A. I can't recollect that. I paid it to him down here in the Broom hotel.
Q. Whose money was that?
A. My money.

Mr. BENNETT: I object to that testimony and now move to
59 strike it out. If he paid it as a voluntary payment and without any authority from the company he cannot charge the company with it, being a director and vice-president.
The COURT: Well, Mr. Bennett, I have seen there were such questions in the case, and I apprehend it is better to receive the testimony and control it hereafter. They have got to put their testimony in piecemeal. Formally, the objection may be overruled.
Mr. BENNETT: I except to the ruling of the court.

Mr. KIMBALL, to the witness:

Q. What, if anything, did Mr. Kerr, the president of the company, know about your having employed Mr. Varian?

Mr. BENNETT: I object; notice to the vice-president is as good as notice to the president. It's immaterial what Mr. Kerr knew about it.
The COURT: Do you deny the fact that he was employed by the company?
Mr. BENNETT: I do absolutely deny it.
The COURT: It may be of some importance that the president of the company, instead of the secretary, or of the vice-president, who did it. It might depend something upon the duties of the officers. That isn't shown at present.
Mr. KIMBALL: I expect to show that all of the officers of that company knew of this litigation pending.
The COURT: We'll take the testimony.
Mr. BENNETT: We except.

Mr. KIMBALL, to the witness:

60 Q. There is an item of $30 was paid Dixon & Varian. On whose account was that paid?
A. Those same cases.
Q. For what purpose?
A. Well, fighting cases for the Corinne Mill, Canal & Stock Co. in this court.
Q. Who paid that $30?
A. I did.

Mr. BENNETT: I hope this will be considered under the same objection.

Exception.

Mr. KIMBALL: I now offer in evidence receipt from Dixon and Varian, $30. There is an item of $50 paid to the man. State what that was for.

A. Same cases. I guess there was three or four cases they were employed in.

Q. The Corinne Mill & Stock Co. was plaintiff in all those suits?

A. Yes, sir.

Q. Whose money paid that?

A. Mine.

Q. Has that ever been repaid by the company?

A. No, sir.

Mr. KIMBALL: I offer in evidence another receipt. Marked Plaintiff's Ex. E. P. E. K. There's another item of $70 charged in case 646 against Johnson. Who paid that money?

A. I paid it.

61 Mr. KIMBALL: I offer in evidence an account in the handwriting of Mr. Varian with a credit December, 1882, Toponce $70, that's not receipted.

Mr. BENNETT: I acknowledge that is in Mr. Varian's handwriting. I object that it is not a voucher.

Mr. KIMBALL: It simply shows Mr. Varian acknowledged he paid it.

Marked Plaintiff's Ex. F. P. E. K.

Exception.

Mr. KIMBALL: There's another item here of one hundred paid to Mr. C. S. Varian; what is that?

A. On the same case.

Q. For professional cases?

A. Yes, sir.

Q. In what cases were those?

A. In those Johnson cases.

Q. Wasn't some of them in other cases?

A. The main case he was in was the case of an attachment where there were some horses.

Q. Did he appear in the supreme court at any time for you or the company?

A. He appeared in the Johnson case.

Q. Did he appear in the Ducheneau and House case?

A. Yes, I think he did.

Q. Did you pay him for that service?

A. Yes, sir.

Q. Out of whose money?

A. Out of my money.

Mr. KIMBALL: I offer in evidence the receipt.

62 Marked Plaintiff's Ex. G. P. E. K.

Mr. KIMBALL, to the witness:

Q. You say you can neither read nor write?
A. Yes, sir; I can read a little print.
Q. Here's an item, "paid to F. H. Church for costs, $967." State who that was paid by.
A. That was paid by me.
Q. In what business?
A. In the business of a suit against a man named Allen, I believe, to collect their ranch bill.

Mr. KIMBALL: I offer in evidence a receipt of Mr. Church.
Marked Pl'ff'- Ex. H. P. E. K.

Mr. KIMBALL, to the witness:

Q. "Cash paid William Hadley." Who was William Hadley?
A. Constable at Corinne, I believe.
Q. What was that paid to him for?
A. Paid on that same suit of Mr. Church to collect their ranch bill, for some cattle belonging to Mr. Allen.

Mr. KIMBALL: I offer in evidence Mr. Hadley's receipt for that money.
Mr. BENNETT: Same objection as before.
The COURT: The same rule.
Mr. BENNETT: Exception.
Marked Plaintiff'- Ex. I, P. E. K.

Mr. KIMBALL, to the witness:

Q. Mr. Fowler was secretary of your company at that time, was he?
63 A. Yes, sir.
Q. Here is an item of $986.50 paid C. C. Loveland, sheriff. Who paid that?
A. The company paid a portion of it, I believe.
Q. And who paid the balance?
A. I paid the balance.
Q. How much of it did you pay?
A. I don't recollect the amount, but I think the company paid $287.
Q. And you paid the balance?
A. I paid the balance.

Mr. KIMBALL: I offer in evidence Mr. Loveland's receipt.
The COURT: It may be received.
Marked Plaintiff'- Ex. J, P. E. K.
Mr. BENNETT: I make the same objection as before and exception.

Mr. KIMBALL to the witness:

Q. The next item is $156.50 paid to me in number 548 and 646 in this court. Who paid that money?
A. On what account, if you remember?

—. ——.

A. It's the same cases that has been in question.
Q. Cases against William Johnson?
A. Yes, sir.

Mr. KIMBALL: I offer in evidence my receipt for the money.
The COURT: It may be received.
Marked Pl'ff'- Ex. K, P. E. K.

Mr. KIMBALL to the witness:

64 Q. There is another item paid me of $25, in C. M., C. & S. Co. *vs.* Johnson. Who paid that money, if you know?
A. I paid it.
Q. On what account?
A. Same old cases.

Mr. KIMBALL: I offer this receipt in evidence.
The COURT: It may be received.
Marked Pl'ff'- Ex. L, P. E. K.

Mr. KIMBALL to the witness:

Q. One hundred and twenty-five dollars paid to me, accounts of costs in the case of The Corinne Mill, Canal & Stock Co. *vs.* Johnson, No. 557. Who paid that money?
A. I paid it.
Q. On whose account?
A. On them cases—Johnson cases?
Q. For whom did you pay it?
A. For the Corinne Mill, Canal & Stock Co.

Mr. KIMBALL: I offer this receipt in evidence.
The COURT: It may be received.
Marked Pl'ff'- Ex. M, P. E. K.

Mr. KIMBALL to the witness:

Q. The next item is December 24, 1885, $50, paid to me. For whom was that paid and out of whose money?
A. Paid by me out of my money.
Q. For whom?
A. For the Corinne Mill, Canal & Stock Co.

65 Mr. KIMBALL: I offer in evidence this receipt also.
Mr. BENNETT: The same objection.
The COURT: It may be received.
Exception.
Marked Plaintiff's Ex. N, P. E. K.

Mr. KIMBALL to the witness:

Q. The next item is $400.00 paid to me on July 9, '86. On what account was that paid?
A. Account of the Corinne Mill, Canal & Stock Co. Same cases.

Marked Plaintiff's Ex. O, P. E. K.

Mr. KIMBALL to the witness:

Q. The next item of $146.31 paid for goods and merchandise for said company, November, '85, to December, '87. Explain that item and say what it was for.

A. I don't hardly know if I can explain all it was for. It was for goods I bought to take to the ranch. I haven't got any vouchers for that.

Q. Where did you keep the account?

A. I didn't keep any account. It wasn't kept in any books; I rendered it to the company and it was settled, I supposed.

Q. To whom?

A. To Mr. Fowler. When I done anything I generally went there and presented the account to him and the company. When he felt like it he'd book it, and when he didn't, he wouldn't. He waited for the instructions of the president in the matter.

66 Q. You rendered him the statement for the $146.31?

A. Yes, sir. That's the reason I have no voucher for it.

Q. Did you actually pay out that money?

A. Yes, sir.

Q. Has it ever been repaid to you?

A. Yes, sir. It was bought to go on the ranch, and some of it to go out and hunt a sheep range in Wyoming, one thing or another.

Q. This check for $50, paid by mistake by you, to whom did you give that?

A. That was a check paid down here at the land office.

Q. For whom did you pay it?

A. For the company, and they charged it to me and so I charged it back.

Q. They charged the check to you?

A. They charged the check to me.

Q. The company gave you its check and you gave it to the land office?

A. Yes, sir.

Q. Here is another item of the same, $100 paid by mistake, I believe, to you?

A. Well, that's a $100 Mr. Kerr drew as president of the company and charged it to me, to ship horses out in Wyoming. I paid the freight and they never credited it to me. It stands charged on the books to me.

67 Q. You have already testified to the railroad fare, you say that your expenses were $300 a year?

A. My traveling expenses, it wouldn't all be railroad fare. A man has to eat.

Q. Your traveling expenses for the whole time would aggregate $1,300?

A. Yes, sir.

The COURT: Mr. Kimball, do you understand Mr. Toponce to testify that where he paid out money in all these cases that he has been testifying about that he reported it to the company?

Mr. KIMBALL: No, I don't understand that.

Mr. KIMBALL to the witness:

Q. State how that was, whether you reported these various items of expense to the company from time to time.

A. No, I never made report every time I paid out anything in those cases. I was waiting till they was wound up. We never got through with them. Whenever there's been any money collected on them lawsuits it's been reported to the company, and they got it.

Q. These suits, with the exception of two or three, haven't been counted up yet?

A. No, sir.

Q. The next item is $129.30, costs in the case of Corinne Mill, Canal & Stock Co., No. 646, *vs.* Wm. Johnson. Did you pay that money?

A. Yes, sir.

68 Q. To whom did you pay it?

A. Paid it here to the court, I suppose. I paid it to my attorneys to settle up.

Q. Whose money did you pay it out of?

A. My money.

Q. $75.00 paid for witness fees in that same case. Who paid that?

A. I did.

Q. Who did you pay that money to?

A. Different men. I don't recollect the men.

Q. They were witness- here, were they?

A. Yes, sir.

Q. For the plaintiff in that case?

A. Yes, sir.

Q. Eighty dollars to J. W. Pike, making transcript of testimony in a case of Corinne Mill, Canal & Stock Co. *vs.* William Johnson; do you remember paying that?

A. Yes, I do; I paid additional costs, too.

Q. When did you pay that?

A. I paid most of it to Mr. Rogers. He commenced a suit.

Q. You paid it on a suit begun by Mr. Pike to recover of the company?

A. Yes, sir.

Q. Out of whose money did you pay that?

A. Out of my own.

69 Q. Eleven dollars paid sheriff for serving summons and attachment. In what case was that? Sheriff of Box Elder county?

A. I think it was to Mr. Loveland to replevin some sheep from Mr. Johnson.

Q. Cash paid to defendant on cost bill in case No. 865, of Corinne Mill, Canal & Stock Co. *vs.* William Johnson, $122.90; who paid that?

A. I paid it to you or Mr. Heywood, I don't recollect.

Q. To your attorneys, to be paid out as costs on that case?

A. Yes, sir.

Q. An item, $25, paid to Steele, marshal's costs; who was Mr. Steele?

A. Deputy marshal.

Q. What was that paid for?

A. To eject William Johnson off the company's land.

Q. That's the time he went to serve the writ of ejectment.

A. Yes, sir.

Q. Here's an item of $50.00 paid witnesses in No. 865; that's the case about the horses. Whose witnesses were those?

A. They were the Corinne Mill, Canal & Stock Co.'s witnesses. I ain't had any other lawsuits except for the company.

Q. To cash to pay defendant's cost bill in the case of Corinne Mill, Canal & Stock Co. *vs.* Johnson, No. 548, $285.55. Who paid that money?

70 A. I paid it.

Q. Out of whose money and for whom?

A. I paid it out of my money for the Corinne Mill, Canal & Stock Co.

Q. And for witnesses in that case, $75.00. Who paid that money?

A. I paid it.

Q. For witnesses on your side in that case?

A. Yes, sir.

Q. No. 670, $48.95, costs in that case against Johnson, who paid that money?

A. I paid all the money. Those accounts were all taken from the court.

Q. All were paid by you?

A. Yes, sir.

Q. No. 556, $19.70; that's the same way?

A. Same way.

Q. Cases against Stark and what's that other man's name?

A. Martin Stark; that's his name.

Q. $28.70; who paid that?

A. I did.

Q. January 11, '85, for feeding for defendant 25 head of yearling colts, $12 each, from January 1 to March 10, '85, $300?

A. Yes, sir.

Q. How did you come to make that charge and what is it for?

71 A. We took up a lot of the company's horses and tied them up and halter-broke them and fed them. We charged twenty cents a day for them each. That makes that item of $300.

Q. You paid for that feed yourself, and furnished it yourself?

A. Yes, sir.

Q. And rented the stable?

A. Mr. Owsley took care of them and the company paid him.

Q. Where was Mr. Kerr?

A. He was there.

Q. What did he know about it?

Mr. BENNETT: Same objection as before.
The COURT: The same ruling.
Mr. BENNETT: Note an exception.

A. He used to come there every day.
Q. What did he know about your furnishing the feed?
A. He knew I was furnishing the feed.
Q. Feeding two stud horses, two years old, from January 1, 1885, to March 10, 1885, $60?
A. That was the same winter.
Q. Feeding three sucking colts during the winter of 1884 and 1885; what was that?
A. They was some company's colts.
Q. Where were they kept?
A. In my barn.
Q. Feeding sheep with hay for the defendant from January 1, '85, to December 1, '87, $34.00.

72 A. That's hay that I furnished to feed the sheep.
Q. Now, that $300.00 item, and the two of $60. State whether that was a reasonable sum for the feed and rent.
A. I think it's very reasonable, twenty cents, to furnish hay, grain and stable room for colts.
Q. This item of $34.00. Have you furnished that?
A. Yes.
Q. And that is what the hay cost you?
A. Yes, sir.
Q. You only charged the company what you actually paid?
A. Yes, sir.
Q. Feeding sheep and saddle horses for defendant between January 1, 1885, to December, 1887, $19.25. What was that?
A. Yes, sir.
Q. Feeding team of defendant from February 1, 1886, to December 1, 1887?
A. That was for taking care of a team that I drove that belonged to the company. We used to have a man and I furnished the company my individual barn.
Q. You furnished the feed for the team?
A. I did the last year.
Q. How much was that worth?
A. Well, it's worth a dollar a day. You can't get a lot of horses kept for less than that. They charged me here twenty dollars a month for one horse.

73 Q. Is that a reasonable and fair charge?
A. Yes, sir.
Q. Here's an item of $50.00 paid Luce for handling stud colt. State what that was for.
A. It was this man breaking horses here, breaking horses a young colt for the company. I sent him down here and had him break him and paid him $50.
Q. Now, Mr. Toponce, during all the time covered by this ac-

count Mr. Kerr was the president and Mr. Fowler the secretary of the company?

A. Yes, sir.

Q. And members of the board of directors?

A. Yes, sir.

Q. What, if anything, did they know of the pendency of these suits brought by the Corinne Mill, Canal & Stock Co., and also of those against it?

A. In several of the cases they was witnesses.

Q. They were witnesses in the cases?

A. Yes, sir.

Q. Who had the charge and management of those cases on the part of the company?

A. I did.

Q. You attended to the subpœn-ing of witnesses and looking after the cases, did you?

A. Yes, sir.

Q. What, if anything, did Mr. Kerr himself have to do with that?

A. I don't think he ever tended any suits at all. I think he was present at some suits. Nothing that comes up here on those bills.

74 Q. Wasn't Mr. Kerr in court at any time when these cases were being tried?

A. Yes, sir; I think he was.

Q. Was Mr. Fowler here at any time when those cases were being tried?

A. Yes, sir; he was present as a witness and juryman during the time some of the suits were going on.

Q. While you were attending the business?

A. Yes, sir.

Q. What, if anything, did they know about your having paid out money on that account?

A. I don't know. They couldn't help but know somebody paid the money. They knew it was paid.

Q. In that case where you paid Mr. Church and Mr. Hadley, that was a case of the Corinne Mill, Canal & Stock Co. before Justice Church, wasn't it?

A. Yes, sir.

Q. Against Allen?

A. To collect a ranch bill. I collected the money and credited the company on the bill. A portion of it was received by the company, paid to Mr. Cole by Mr. Fowler's order, secretary of the company, an order given on Mr. Church.

Q. Where did you get these items that you placed in this account?

A. Well, I think Mr. White got all the court items here. The other items from the receipts themselves.

Q. Where did you keep the receipts when you got them?

75 A. I kept them in Mr. Kimball's office most of the time. I think a part of them have been there all the time.

Cross-examination.

Examined by Mr. BENNETT:

Q. When was the Corinne Mill, Canal & Stock Co. organized?
A. I think it was in January, '83.
Q. I understood you to say that you and Mr. Kerr substantially composed the company?
A. Yes, sir.
Q. Equal shareholders, were you?
A. Were on the start to begin with.
Q. The headquarters of the company were at Corinne?
A. Yes, sir.
Q. You resided there?
A. Yes, sir.
Q. Did Mr. Kerr reside at Corinne?
A. A portion of the time he did. He moved up there and lived there.
Q. When did he go there?
A. I don't recollect when it was.
Q. How soon after the company was organized?
A. I don't think it was a great time. Probably might have been a year. Then he lived there a year or two. Then he staid there at the hotel after the family he lived with moved back to Salt Lake.
Q. You couldn't tell when they moved back?
76 A. No, I don't remember. I couldn't tell when he went to live there.
Q. Can you tell when he ceased to live there?
A. I think something like two years ago.
Q. Mr. Kerr, I understand you was a director and president of that company?
A. Yes, sir.
Q. Did he have anything to do with the management of the company's affairs?
A. Yes, sir.
Q. What part did he take in the management?
A. He paid the checks, signed checks and went down to San Francisco and settled the land matter every year and done anything there was to be done the same as anybody else.
Q. Did he have any special charge of the sheep?
A. Yes; the first year he was to take charge of the sheep.
Q. At or about the time the company was organized, did you or he have any arrangement or agreement about the management?
A. Yes, sir.
Q. What was that?
A. I was to manage all the business with the exception of the sheep, which I told him I knew nothing about, and I couldn't do anything with them.
Q. He was to manage the sheep?
A. Yes, sir.
Q. And the finances?

77 A. Yes, sir; he managed them about a year, and then he turned them all over to me.

Q. It was agreed at the same time that neither of you should charge a salary?

A. No, sir. It was not.

Q. It was not?

A. No, sir.

Q. There was nothing said about that?

A. No, sir.

Q. You understand the question?

A. Yes, sir. You asked me if it was agreed, if I understand your question, you say it was agreed that neither one of us should get a salary.

Q. I ask you if there was such an agreement and you say no?

A. There was nothing said about it.

Q. My question was confined to a time at or about the organization of the company.

A. I know, there was nothing said about wages in either one way or the other.

Q. Not at that time?

A. No, sir.

Q. Was there before or after that?

A. No. I don't recollect anything being talked between us about wages. I think in our by-laws it states that the officers—managers, shall have a salary, but I don't think any ever drawed any excepting the secretary.

Q. Didn't Mr. Kerr ever charge any salary?

78 A. I think not.

Q. Did you ever until you brought this suit?

A. No, sir.

Q. You now claim how much a month?

A. $250, I believe.

Q. You think, however, those services were worth $300 instead, you say?

A. Yes, sir. I think they're well worth $300.

Q. Did you ever render a bill to the company for services?

A. No, sir.

Q. Did you ever render a bill for any of these items Mr. Kimball has just introduced?

A. Yes, sir. I rendered a bill for them.

Q. When?

A. There was two or three items, checks and those things in that account.

Q. Which items did you render a bill for?

A. Item of $900 and check for $50. I rendered them to Mr. J. K. Fowler, and told him to give me credit for it. I don't know if he has done it or not.

Q. Did you ever render a bill for the feeding of the colts?

A. Yes, sir.

Q. When?

A. Oh, I rendered it that very winter we fed the colts, four years

ago this winter. The horses are four years old this spring that we fed.

Q. Did you ever render a bill for the feeding of the team?

79 A. Yes, sir.

Q. When?

A. Same time.

Q. To whom?

A. To Mr. Fowler.

Q. You speak of rendering a bill to the company for an item of 900 odd dollars, that is the Loveland bill?

A. No, it's another bill that Mr. Fowler made out himself.

Q. What item is it?

A. Two of them is $100 and $50; that's $150. Then there's a bill for commissions. We don't say anything about that.

Q. In your first cause of action the amount is some four thousand and odd dollars; how much of that have you ever rendered a bill for to the company?

A. Well, I think I've rendered for nearly the whole of it to Mr. Fowler. I'd tell him I had paid out so much money.

Q. That's the only way you ever rendered a bill?

A. I'd go there and I say, "Here; I have paid out so much money." Sometimes he'd give me credit on the books and other times he wouldn't.

Q. You can't specify the items you have reported so to Mr. Fowler?

A. No, I couldn't.

Q. But you never rendered any bill for services as manager?

80 A. No, sir. Not till I commenced this suit.

Q. You know, do you not, that the by-laws of your company do not authorize the employment of a manager?

A. I don't know anything about what the by-laws reads now; I haven't seen them for a long time.

Q. In what did your duties consist, or in what did your labors consist during these years?

A. Well, knocking around, tending to the business of the company. Chasing fellows off the land, trying to guard the land, tending to the stock on the ranch, digging ditches, superintending putting up fences, all contracts, and so forth.

Q. You lived in Corinne?

A. Yes, sir.

Q. How much of your time was occupied on the ranch during the first year?

A. I don't suppose I staid on the ranch at one time more than two or three days together. I'd go up there and come back the same day.

Q. Upon what did you base the estimate of your claim for services, upon the labor, or simply the fact that you was employed in the capacity of manager?

A. It took all of my time traveling night and day.

Q. Do you mean to say, Mr. Toponce, that there was not an un-

derstanding between you and Mr. Kerr as to your time and his time, as connected with the management of the company.

81 A. I mean to say there was nothing said until after the sheep was put into the company.

Q. Then there was something said?

A. Then there was something said.

A. What was said in regard to your salary and his salary?

A. I told Mr. Kerr he was putting those sheep in at too high a figure—he was putting them in at $6.50 a head, and I says I can't afford to pay interest on that money. Well, he says, you can let your time go on them sheep, and in place of that he went to work and drew a note and charged interest to the tune of about $15,000 and I had to acknowledge judgment to Mr. Kerr for that.

Q. Is that all?

A. That's what they done, and after I had paid the interest I turned in and sued the company for salary.

Q. Have you stated the agreement just as it occurred?

A. I think very nearly in his words.

Q. I'll ask you directly, wasn't it then and there agreed that neither of you should have any salary?

A. No, sir. There was no agreement till after the sheep went in.

Q. Well, I'm speaking of that time now.

A. My time was to go against the interest on this sheep.

Q. Was that paid in dollars?

82 A. He took 15,000 shares at 60 cents a share to pay it, and that gives him the control of the company, and in the place of running an account he has credit on the books for bills receivable for $71,000. I supposed my time was going against his money, and that's the agreement I made.

Q. Was he to have a salary?

A. No, sir.

Q. What was said about that?

A. There was nothing said. He never claimed for any salary. He never done anything, in fact, excepting sign checks. He never went out on the ranch at all.

Q. You are a little rash in saying that, are you not?

A. No, I am not. For months and months he had been down at Salt Lake. Sometimes we wouldn't see him for seven months.

Q. When?

A. Why, he'd be probably out here in Wyoming.

Q. Where he had sheep?

A. Yes, sir.

Q. Your revenues all or nearly all came from the sheep, didn't they?

A. Yes, and land that we sold.

Q. So there was nothing said about Mr. Kerr's salary?

A. No, sir.

Q. He was financial manager of the company, wasn't he?

83 A. Yes, sir. When we went in, the fact was, I had the land, the right of purchase from the Central Pacific railroad, and offered the land for sale; and I was unable to purchase it alone,

so we formed this company, and with the understanding that he was to go to work and furnish money to carry this thing out at a reasonable rate of interest, so I turned it in; it cost me over $100,000, and I gave him a half interest for $10,500. I went to work, and purchased it from the Central Pacific railroad. We purchased 50,000 acres while Mr. Kerr was in Wyoming getting those sheep around he had sold to the company, and there was nothing said about wages till the sheep come in. Then, when it came to a question of interest, and I never knew there was such a note in existence till I was subpœnaed, then I had to send to Mr. Kerr to get it. That was the first I knowed there was such a note in existence. Then I confessed judgment. I supposed you know all about that.

Q. Kerr put up all the money there was used in the concern, didn't he?

A. Not all of it.

Q. Except what you paid out for lawsuits?

A. I had $17,000 carried on the books of the company for quite a while.

Q. For the property you turned in?

A. Yes, sir.

Q. Not from any money you put in?

A. No, I didn't put in any money. That is, only what I paid out.

84 Q. Mr. Kerr paid the money for the property you turned in, didn't he, to Wells-Fargo?

A. He paid me what he contracted for, $10,500. He owned the sheep.

Q. He sold them to the company?

A. Yes, sir.

Q. Now, you say this arrangement between you and Mr. Kerr was about the time the sheep was sold?

A. Sometime about that time. We were negotiating about those sheep.

Q. How did you learn?

A. I think Mr. Kerr read it himself to me. Either him or Mr. Fowler or some of them.

Q. Do you remember whether there was a board meeting to take into consideration of Mr. Kerr for the sale of the sheep?

A. Yes, sir. I think there was.

Q. You had nearly all of you to be there to make a board?

A. There were generally five of us there.

Q. You were there?

A. Yes, sir. I think so.

Q. Do you remember the action of the board upon that proposition?

A. No, I don't recollect exactly what we done. I know we bought the sheep——

Q. I'm confining your attention, if I shall be fortunate enough to do so, to that meeting; you remember the meeting?

85 A. Yes, sir.

Q. And you remember that the subject was before the meeting?

A. Yes, sir.
Q. There was a full board present?
A. I think there was.
Q. Did you see the proposition at that time?
A. I don't know if I did at that time or not.
Q. Wasn't it read by the secretary?
A. Him or Mr. Kerr.
Q. You understood it?
A. I understood it.
Q. With reference to that meeting, when was it you and Kerr had that talk with reference to your services standing off interest?
A. Before the sheep was turned in him and I talked about those sheep several times.
Q. How long before this meeting was that?
A. I don't recollect. I can't say.
Q. You can give some idea?
A. No, I can't give no more idea than about anything else. I know we talked about those sheep several times.
Q. What I want to fix the day as near as possible that you and Kerr had this talk about salary.
A. Well, I couldn't tell you just what day it was; it was sheep was received.
Q. And before the board meeting?
A. I think it was.
86 Q. In which action was taken with regard to this proposition?
A. Yes, sir.
Q. About how long before?
A. It might have been a day or two, or three or four, or it might have been a week or two, because we was together and talking about this thing and other things the same as all men do, you know. I know this, that Mr. Kerr left on the 2d of March, I recollect that very distinctly, to go and get the sheep.
Q. Was any other conversation held between you and Mr. Kerr in regard to your salary after that?
A. No, there was hardly anything said, excepting I said I wouldn't pay any interest on those sheep.
Q. Well, you said you wouldn't?
A. No, and he said he didn't want any. He wasn't to have any, and I wasn't to have any salary, and we wasn't to pay any interest. In other words, my time was going against the interest on the sheep.
Q. I now hand you a paper dated Corinne, January 1, 1883, signed by John W. Kerr. I'll ask you to state to the jury whether that is the proposition for the sale of the sheep.
A. If you read it. Perhaps I can tell by looking at it. Well, I guess that's the proposition. It's Mr. Fowler's handwriting.
Q. You are quite sure about that?
A. I am quite sure about that.
87 Q. You think that is the proposition you have alluded to?

A. I know there was a proposition. I don't recollect what it was.

Q. You recollect there was a paper read at a board meeting, at which you were present?

A. I haven't heard it read; if you will read it I will tell you.

Mr. BENNETT: I offer this paper in evidence in connection with the cross-examination, to explain the testimony now given.

The COURT: Do you want to use it for the purpose of cross-examining him?

Mr. BENNETT: Yes, sir.

The COURT: It may be received for that purpose.

Mr. KIMBALL: I object, as it is not proper cross-examination, and immaterial, incompetent, and irrelevant in this case. It does not prove or disprove anything he said, and it's an examination of the witness on an entirely different subject.

The COURT: He has made a charge here and given testimony tending to show that he rendered the services for the company; if they do not claim that this witness's testimony tends to show any promise on the part of the company to pay for it, this will be wholly out of place.

Mr. KIMBALL: It tends to show that he rendered the services and they accepted them.

88 The COURT: Anything that tends to disprove the contract is proper upon the subject of the compact. He says that he had an agreement with Mr. Kerr that he was to have the interest offset against his wages, and now this, I apprehend, bears upon that. I think this is proper to allow Mr. Bennett to make use of this for the purpose of cross-examining the witness. I hardly think it had ought to be introduced as independent proof.

Mr. KIMBALL: I object that this addenda is not proof of anything.

Mr. BENNETT: I simply offer the contents of the paper above the signature.

Mr. KIMBALL: We except to the ruling.

Mr. BENNETT, to the witness:

Q. I now show you the proposition, and after it has been read to you, state whether it is the proposition for the sale of the sheep made by Mr. Kerr.

Mr. BENNETT reads to witness. Is that the proposition which was under consideration?

A. Yes; not exactly that proposition, something similar to that; there was no interest. That interest has been chucked in there since.

Q. You say that deliberately, do you?

A. I do, most emphatically.

Q. That proposition was read, was it, at that meeting?

A. There was a proposition read; there was no interest in it. If there had been I wouldn't have had to send for Mr. Kerr to find out what note I was sued on.

89 Q. Do I understand you, Mr. Toponce, to say positively that there was to be no interest on that $71,000; do you say to the jury that that proposition was not read to you?

A. I say a portion of that proposition was, but there was no interest mentioned.

Q. I ask you a straight question and you can give a straight answer to it at your peril. Was there or was there not a proposition read to you at the meeting to which you have referred, which was held on the 17th day of February, 1883—was that proposition just as I have read it?

A. Not that proposition as you have read it.

Proposition of sale, marked Plaintiff's Ex. K, P. E. K.

Q. I understand you neither read nor write?

A. That's what I said.

Q. I suppose you can figure the amount at seven per cent. interest on $70,000 and state it to the jury?

A. No, sir; I don't think I can. I can probably if you give me time enough.

Q. How much interest would $70,000, principal, amount to in one year at seven per cent. per annum?

A. About $5,000, isn't it?

Q. You consider your services worth $300 a month?

A. Yes, sir.

Q. You demand in your complaint $250 a month?

A. Yes, sir.

90 Q. That would be $3,000 a year?

A. Yes, sir.

Q. The interest on $70,000 would be $4,900?

A. Yes, sir.

Q. And you mean to say to this jury that Mr. Kerr agreed to remit the interest on $70,000 in consideration of your services?

A. Yes, sir; that is what I mean to say; that is my portion of it. There was only half of that belong to me; he had more stock than I did. He had 65,000 shares and I had 50,000.

Q. It wasn't a stock transaction; a money debt for the sheep?

A. Certainly, he got $9,000 in stock.

Q. Do you mean to say to this jury that by the arrangement, as you understood it, Kerr's services along with Kerr's interest on $70,000 were to be an offset to your services?

A. Yes, sir. Of course it wasn't all the interest on $70,000, because he had to pay a certain portion himself. He had to pay on 65,000 shares and I had to pay on 50,000, and the other directors had to pay on 17 shares between them.

Q. Do you remember when the meeting was held at which the sheep compact was closed?

A. No, I don't recollect the day?

Q. About when?

A. Sometime in February, I think.

91 Q. And you say that the talk in regard to the salary and the interest was some days before that?

A. Yes, sir.

Q. This meeting by which the sheep was turned over to the company, was that before this meeting?

The COURT: He has said it was.

The WITNESS: We talked about the sheep; I told him it was too high. He put the sheep in at about $6.50 a head.

Q. But you don't answer directly?

A. I said I think it was before that time.

Q. How long before?

A. It might have been a day or two, or it might have been a week. I could not say what time.

Q. Did you ever talk with him after that?

A. We talked about it hundreds of times.

Q. I mean about your salary?

A. Not about the salary; about the money the company was owing Kerr, because that was all settled between him and me.

Q. I think the company went a year or two without any meeting.

A. There was only us two to consult.

Q. When was the next meeting after the one at which the sheep trade was settled?

A. I think it was to ratify some land sales.

Q. About when was it?

A. I couldn't say. I think we bought the land from the
92 Central Pacific railroad, the contract shows, some time in the spring of 1883.

Q. After this meeting at which the sheep trade was closed, state whether or not Mr. Kerr made any advances to the company in its general business?

A. Yes, sir. I think that he did.

Q. Is it not true that the company constantly, for four years after its organization, on open account to Mr. Kerr for money advanced?

Mr. KIMBALL: I don't see the object of that in this cross-examination—what Mr. Kerr advanced to the company subsequently.

The COURT: I apprehend that is preliminary.

Mr. KIMBALL: It can't relate to the question of salary.

Mr. BENNETT: I'll state that it does not relate to the question of salary. It relates to another cause of action, but to advances this man says he made on the *the* company's account.

The COURT: Go on.

Mr. BENNETT, to the witness:

Q. Was there ever a time, during the four years after the organization of the company when you could not go to the treasury and draw money for the business of the company?

A. Yes, sir.

Q. When?

A. Lots of times.

Q. That is not answering my question, when and how do you know——

93 A. Well, I know that every time I went for money, or hired men and they went for their money, he'd say: "Well, I didn't hire you. Go to Toponce."

Q. The checks were all drawn by Mr. Fowler?

A. No, sir; they were all drawn by Mr. Kerr.

Q. Was there ever a time when a bill could not be audited and paid at the company's office?

A. I said there was plenty of times they were not paid. They was refused.

Q. Because the bill was objected to?

A. No, sir; because the company hadn't any money.

Q. Did you ever demand any item which you have now rendered in your first cause of action as costs paid out—did you ever demand payment from the company for any of those items?

A. I said I did not, not directly; I never got through with the cases. The cases never got wound up. They are all in court here now.

Q. What is the sum total of your bill?

Mr. KIMBALL: Forty-eight hundred and eighty-two dollars and some cents.

Mr. BENNETT, to the witness:

Q. You advanced forty-eight hundred and eighty-two dollars in costs and fees and court expenses and never demanded it back from the company?

A. I didn't say I didn't do that. I didn't make any demand, as I owed the company on their books. They had a balance against me and we worked together.

94 Q. That would be a good way to pay your debts—have it allowed and credited to you?

A. Yes.

Q. But you didn't do it?

A. No, I never did anything about it at all.

Q. Why didn't you?

A. Because, as I say, I hadn't finished those suits; none of the suits wasn't determined. There never was a case terminated during my administration.

Q. Do you consider that a good reason for not demanding money to reimburse your pocket?

A. We was paying interest to John W. Kerr one per cent. a month, compound interest, and I didn't care to go and say, Here I want to pay these bills. I thought it was just as well to go and draw the money and not pay interest on it—compound interest monthly. That is one reason I didn't draw on Mr. Kerr.

Q. You preferred to lay out of the money yourself?

A. I wasn't laying out of it. If I had got it of Mr. Kerr I would have to pay him one per cent. a month.

Q. It wasn't worth interest to you?

A. It was worth interest; if I paid it to him I didn't have to pay it.

Q. Isn't it true that you agreed with Kerr to carry on this litigation at your own cost?

A. I never did.

Q. Haven't you said so to numerous people?

95 A. No, sir. Not this litigation; the little trespass cases.

Q. How many cases were there of these cases here except against Mr. Johnson; didn't that agreement include the carrying on of those cases yourself?

A. No, sir.

Q. Isn't that the reason you never collected these monies from the company?

A. No, sir.

Q. Wasn't it agreed?

A. We made an agreement with Mr. Kerr, I'd fight these trespass cases, if I got in anything I could have it.

Q. That was for——

A. Yes, sir. The first two cases I tried I got the money.

Q. How much did you turn on account of those cases?

A. I think the company got about two hundred dollars.

Q. And this cost bill of $4,882.00?

A. Yes, sir.

Q. And more to be heard from?

A. Yes, sir.

Q. Now tell me how many cases you brought or defended under this arrangement with Mr. Kerr, and what the titles of the cases were, if you can?

A. I can't. They're all cases in the justice's court.

96 Q. You can't give a list of them?

A. Yes, I expect I can.

Q. You can't now?

A. No, I can't now.

Q. You say that that didn't include any of the Johnston cases?

A. No, sir. These cases were all brought in this court. They were all commenced at Mr. Kerr's suggestion.

Q. You mean the Johnston cases?

A. Yes, sir, that's what I mean.

Q. Is Johnston still living?

A. Yes, sir. There is other living witness here too, that know the business.

Q. I see one charge in the first cause of action of something like nine hundred dollars paid Carl C. Loveland, can you explain that to the jury?

A. It was for attaching a lot of horses in the hands of Mr. Johnston and holding them in one of them cases against Johnston.

Q. Attachment, I suppose, to secure a debt?

A. No. This suit was commenced against Mr. Johnston for cutting a certain lot of sheeps' throats, and Mr. Kerr instructed the attorneys that he thought he better sue in attachment before Johnston could get away. He had cut two or three hundred sheeps' throats and left them laying and Mr. Chase commenced a suit of

attachment, and I think attached sixty head of horses. Somewhere about forty or sixty head.

97 Q. The suit was tried?

A. The suit was tried.

Q. And the company was beaten?

A. The company was beaten.

Q. When did you pay the money?

A. I don't know; the suit shows. I paid it from time to time, as I could get it.

Q. Did you ever ask the treasurer of the company to advance that money?

A. Yes, sir; and the president of the company, too.

Q. When?

A. Oh, various times; I couldn't state when.

Q. You asked the president?

A. Yes, sir.

Q. Didn't he claim to you at that time that that was of the suit you were to pay the costs in?

A. No, sir; he never claimed anything of the kind; he was always hard up for money.

Q. He didn't claim that was your speculation?

A. No, sir. The District court suits he had commenced himself. Those little suits that I brought up here in the justice court; he says, I ain't going to put up any more money to fight lawsuits; and I says all right; and I says, if I can collect this money I'll fight them and save the land.

Q. At the time the colts were brought in and stabled fed and by you, as you say, had the company a stable?

A. No; they never owned a stable.

98 Q. Well, they maintained a stable, didn't they?

A. Yes.

Q. At that time?

A. Yes; they had a stable where we kept the horses and the mule team and the team I used.

Q. Who dictated that?

A. Me and Mr. Kerr talked about it, and he says, "We better take them up," and I took them up; and he says, "Go right on and buy some hay, and take care of them;" and I went to work and did so, and he was there and looked at me.

Q. How long were they stabled there?

A. I think somewhere between two and three months.

Q. When was that?

A. That was four years ago this winter—three years ago this winter.

Q. The item in your bill of three hundred odd dollars is for that stabling and care and feed?

A. Yes, sir; and stable rent. I rented a stable from Mr. Guth.

Q. Did you ever render that bill to the company?

A. Yes, sir.

Q. When?

A. Right then and there, that same winter.

Q. In a meeting?

A. No; I don't know as it was in a meeting; I told Mr. Fowler what I paid out for those horses. He says, "Well, you know how it is. I can't put those down till I see the old man."

99 Q. Did you ever render it again to Mr. Fowler?

A. Yes, lots of times.

Q. When; after that?

A. I don't recollect when it was; I know I talked with Mr. Fowler about those things lots of times.

Q. Did you ever keep account of what you furnished?

A. No; I just charge so much a day for hay and grain. So much a head.

Q. That is to say, you acted as a stableman?

A. Yes, sir.

Q. Entertainer of the colts?

A. Yes, sir. Mr. Owsley took care of them and the company paid him, and I charged twenty cents a head for the feed and stable rent.

Q. Then it isn't true that you rendered hay bills and oats bills and for other supplies to the company?

A. No, I think I paid some bills for some bran to Mr. Fowler.

Q. The transaction then was this, that you stabled and kept those animals?

A. I kept them for the company. And when I bought anything from the mill—from the company—it was the same as though I bought it from anybody else. I paid my bills.

Q. Then it's true that the company owes you for keeping those animals and don't owe you for the feed you bought—for feeding those animals?

A. For feed and supplies, yes, sir.

100 Q. This is the truth in regard to that; that you took those colts into your stable which you yourself rented; you took care of them; feed them, and the charge you now make is for twenty cents a head to be paid you by the company?

A. Yes, sir.

Q. Did you take care of them?

A. I said Mr. Owsley took care of them.

Q. They were cared for in your stable?

A. No, sir, I just furnished the feed for them and the stable and the company took care of them and I charged them so much for their feed.

Q. You furnished the hay and the oats and the stable?

A. Yes, sir.

Q. And you took in, and took care of, or housed, I may say, and fed those colts during three months?

A. I don't recollect how many days it was.

Q. You claim that the company owes you twenty cents a day per head for that time?

A. I think it foots up twenty cents a day.

Q. Then that statement isn't true, that the company owes you for money you have paid out for hay and oats?

A. They owe for hay and oats at other times.

Q. I am asking you about this disti-ct charge. It is not true that the company, on account of the care of those colts, owes you for hay or oats, or feed or rent of the stable?

101 A. I don't know what you call it; I charge them $12 a head for them colts.

Q. Now, let us see what the facts are in regard to the stabling of the team, another item of this bill. When did you do that service to the company?

A. The last year that I was manager of the company.

Q. The last year you claimed to be manager of the company?

A. The last year I was manager of the company.

Q. How many animals did you feed and take care of, and from what time to what time?

A. I think I kept them a little over twelve months.

Q. Was that before or after the company closes its stable?

A. The company discharged the man who took care of the mail team.

Q. Who requested you to take the team and the saddle horses and care for them?

A. Mr. Kerr.

Q. Distinctly?

A. Yes, sir.

Q. When?

A. He says: "We'll discharge this man, it will be cheaper to keep the team and hire them kept." He say: "You either keep those horses over there and take care of them or take them to a livery stable."

Q. When did that commence?

A. In the spring of '86. The last year I was manager of the company; that was in '86.

102 Q. When did that cease?

A. I couldn't tell exactly. I could tell by the book.

Q. How long did you keep them?

A. A little over twelve months.

Q. How many of the mules did you care for?

A. Sometimes I had two, sometimes I had four or six, sometimes nine or ten and sometimes there wouldn't be one.

Q. How do you arrive at this item of $660.00 as your charge of keep of those horses during that year?

A. I make it up on the basis that they charge me at the livery stable.

Q. Let me see then; you kept them for hire then, did you?

A. That is, I charged so much for keeping them. I charged so much a day for keeping the horses. Taking it on that basis. Sometimes, as I say, there would be none in the barn and sometimes there would be ten.

Q. Then you assume a position of a feed-stable keeper for those horses?

A. That's what you'd call it, I guess. I had the privilege of going over and putting them in the livery stable and having them charged

to the company, or take care of them myself. The livery stable was across the railroad track, and I preferred to take care of them.

Q. When did you first make this claim of $660 to the company, did you ever make it?

103 A. Yes; I have talked to Mr. Fowler about this account again and again, and told him I ought to have credit on the books, and he says: "Well, I can't put it down till the old man comes." It's not only with my own case, but his own and everybody else's.

Q. You haven't answered my question. Did you ever render the bill to the company?

A. I said I rendered it to Mr. Fowler; not an itemized bill. I told him the same as I'd done in the other bill; I went and says: Here, I paid out so much for these horses; I should have credit on the books for feeding those horses. "Well, all right;" he'd make a *a* memorsndum.

Q. When did you have that talk first?

A. Nearly every day we'd meet one another.

OGDEN, UTAH, *March* 15, 1889—10 a. m.

ALEXANDER TOPONCE, recalled for cross-examination.

Examined by Mr. BENNETT:

Q. Mr. Toponce, when did you first commence your labors with the Corinne Company?

A. In '83.

Q. What time in '83?

A. About January—some time in January.

Q. What property had that company at that time?

A. They had the Corinne mill, some water ditches, the place known as the Toponce ranch, some horses, and a few head of cattle.

Q. Any land except the Toponce ranch?

104 A. No, they had no land they had a title for. They had some land taken up under the desert-land bill.

Q. Were they in possession of any claim except the Toponce ranch?

A. Yes, sir.

Q. What land?

A. Desert land.

Q. Now, "desert lands," don't seem to mean much—what sections were the lands, and where were they in reference to Corinne?

A. They were scattered all up and down the valley between Corinne and the ranch.

Q. You remember the sections or the parts of sections?

A. Some of them.

Q. Please state what sections and parts of sections they were.

A. They had 22 in township 10, they had section 2 in 9, and they had 34 in 13—that's where the old ranch is; a portion was on the desert-land bill. There were several cross-sections; I couldn't say now. We had about twenty sections.

Q. At that time you had no railroad line?
A. Not at the time we commenced.
Q. At the time you commenced your labors with the company they had no railroad lands.
— ——.
Q. I understood you to say yesterday that part of your duty wasn't to purchase and sell land?
105 A. Yes, sir.
Q. Who prescribed that duty for you?
A. Mr. John W. Kerr.
Q. The company did not do it?
A. Well, it was the company; I only knew Mr. Kerr as the company.
Q. I speak of the desert lands; in what condition were they as to title, and who were applying for the titles to the desert lands?
A. Different persons.
Q. Yourself among the number?
A. Yes, sir.
Q. Any other member of the company?
A. Yes, sir.
Q. Who?
A. Mr. Spencer had one.
Q. What's his first name?
A. D. H., I believe.
Q. Who else?
A. Mrs. Pitt had one; I think Mrs. Grove, Mrs. Fowler, Mrs. J. K. Fowler.
Q. Any others?
A. I don't know whether any others had desert entries or not; Mr. Ed. Spencer had one.
Q. Any others?
A. Mrs. Toponce had one.
Q. Can you mention any others?
A. Well I don't recollect them all; there was a good many of them.
106 Q. Do you remember any other names?
A. Yes; I think I can think of some other claims that was on timber-culture and pre-emption.
Q. Why do you say the company had an-thing to do with those desert entries?
A. Well, if you want to know exactly why, because they put up the money. They furnished the money for those parties.
Q. Who did that business?
A. I did.
Q. And did you do it as manager of the company?
A. Yes, sir.
Q. Have any of those claims ever resulted in title to the company?
A. Yes, sir.
Q. How many and what sections and parts of sections?

A. Well, there is none of them, I think, that the company has ever obtained patents for; they got the proof on three of them.

Q. What about the balance?

A. The balance; some of them is canceled, some of them have been relocated by somebody else, and some still stands.

Q. Under your management, and as a result of your management, how much money has the company paid on those desert entries?

A. Oh, I suppose five or six thousand; may be a little more.

107 Q. You, as manager, have disbursed that, have you?

A. No, sir; not all. Mr. Fowler paid some of it out.

Q. The demands for the money were turned into you, were they?

A. Yes, sir.

Q. That whole business, then, was a result of your management?

A. Well, no; not of mine alone. Mr. Kerr furnished the money and some of the names; I furnished the balance.

Q. Did the board of directors of the company have anything to do with that as a board?

A. I couldn't say whether they did or not.

Q. You know, don't you?

A. I couldn't say whether they did or not.

Q. Isn't it a fact that the board of directors had nothing to do with it; the matter was never brought before the board?

A. I don't know whether it was brought before the board or not. I know the company put up the money.

Q. You haven't answered my question.

A. I say I don't know whether it was or not.

Q. Did you ever bring it before the board of directors?

A. No, I never brought it before the directors, they all knew about it.

Q. But you used the company money in your management all the same?

108 A. Yes, sir, it was company money that Mr. Kerr advanced to the company.

Q. And most of it is lost?

A. No, sir.

Q. What?

A. No, sir.

Q. What?

A. I say no, sir.

Q. How many entries have been cancelled that you paid money for?

A. I expect eight or ten.

Q. How much money would that require?

A. About three hundred dollars a section.

Q. And you say that about ten have been cancelled?

A. Yes, sir.

Q. That would make something over three thousand dollars?

A. Yes, sir.

Q. And I ask you again if that whole matter was under your supervision?

A. Yes, sir.

Q. Mr. Toponce, when you took charge of that business as manager, how many horned stock belonged to the company?

A. Well, I couldn't state exactly. We bought a few more horned cattle. I don't think we had over thirty or forty head of horned stock.

Q. How many were turned into the company at its organization?

109 A. I don't think there was but ten or twelve head that belonged to me. I sold them to the company. Also some horses.

Q. When you took charge of the business, did you make a count of the cattle on the ranch?

A. I think we did. I think they are on the book.

Q. I ask you as fact. Did you, as manager, take a count?

A. Yes, sir.

Q. How many did you count?

A. I don't just recollect now. I think they're on the books. I never charged my mind with that. There was only a few head we bought.

Q. How many animals did you take charge of. I am speaking of the cattle now?

A. I think there was about fifteen or twenty; only a small bunch.

Q. The management of those cattle was committed to you, or at least you took charge?

A. I took charge of the cattle and all the stock that was on the ranch.

Q. Did you ever at any time, up to the autumn of 1887, count the cattle you had?

A. Yes, sir.

Q. When?

A. We sold them.

Q. When did you count them?

A. When I sold them. We didn't have no cattle in '87; the company didn't. They had sold them.

110 Q. When?

A. I don't remember the exact time. Some time in '87 or '86.

Q. Who sold them?

A. I did.

Q. Anybody else interested in them?

A. In the ones I sold?

Q. Yes.

A. I was interested in the company and I sold them to another party.

Q. Was Owsley interested in the cattle?

A. Yes, sir. I sold them to Owsley—twelve head.

Q. What relation did he bear to the company at that time?

A. He was foreman on the ranch.

Q. Before you sold them, did you bring the matter before the board of directors?

A. No, sir. I told Mr. Kerr and he said we'd better sell everything that we could raise money on.

Q. You didn't bring it to the attention of the board?

A. We had no board. The board didn't meet.

Q. You had a board of directors for the company?

A. Yes, one was in Chicago and another was in Paris.

Q. You say then you did not bring the matter of selling the cattle to the attention of the board of directors?

111 A. No, sir. I talked it over with Mr. Kerr and Mr. Fowler, that was all the directors there was there.

Q. When did you sell the cattle to Owsley?

A. I don't recollect the date.

Q. Were you interested in the cattle with Owsley after that?

A. Yes, sir.

Q. To what extent?

A. I owned one-half of them.

Q. Then you sold them to yourself really?

A. No, sir. I sold them to Mr. Owsley.

Q. Then he passed you back half of them?

A. Yes, sir.

Q. How soon after the sale?

A. Oh, a short time. He's got them yet.

Q. You own a half in them yet?

A. Yes, sir.

Q. Did you turn all the purchase price into the compano in cash?

A. Yes, sir. No, I didn't in cash to them; I turned it to Mr. Kimball to pay lawsuits, and they charged it to Mr. Owsley.

Q. You never turned into the company the purchase price of those cattle?

A. Yes, I turned it to the company. I sold Mr. Owsley so many cattle for $400.

Q. You paid the money to Mr. Kimball?

A. Yes, sir.

Q. You never paid it to the company?

112 A. The company got it from Mr. Owsley.

Q. Did you ever pay any of that money to the company?

A. I did not.

Q. Did you ever report to the company or the board of directors, or the secretary of the company, that you were to be a half owner in those cattle?

A. Yes, sir.

Q. To whom?

A. To the secretary.

Q. When?

A. Shortly after I sold the cattle.

Q. What did you tell him, and where was it that you told him?

A. I couldn't tell you. It might have been in the office and it might have been on the street.

Q. You don't remember?

A. No.

Q. Did you give Owsley his bill of sale in the name of the company?

A. I don't recollect whether I did or not. I told him he could get a bill of sale from the company any time.

Q. How many head of cattle did you sell to Owsley?

A. Twelve.

Q. The company owned more cattle than that, didn't they?

A. Not at that time.

113 Q. When was that?

A. I think it was in '86 or '87.

Q. Isn't it true that you reported to the company that the cattle on the range belonging to the company were fifty-six head?

A. No, sir.

Q. Did the company at any time own fifty-six head of cattle?

A. I think they owned about fifty-six head, as I stated before. We sold off a number of cattle — the company; we kept selling off the cattle till we got down to twelve head and I sold them out to Mr. Owsley. Mr. Kerr says, "Sell everything to raise money."

Q. When was it that you had fifty-six head or more?

A. Mr. Owsley had fifty-six head of his own and mine on the ranch.

Q. Were those the cattle you sold to him?

A. No, sir.

Q. A part?

A. Yes, sir. A portion of these. He paid pasture bill on them.

Q. Well, you sold the cattle to Owsley—twelve head?

A. Yes, sir.

Q. You retained a half interest, too?

A. Yes, sir.

Q. Did you make any contract with yourself and Owsley about the pasture of those cattle?

114 A. Yes, sir. We had a contract with the company.

Q. Who made that contract?

A. I did.

Q. And you had the benefit of it after you sold the cattle to Owsley?

A. Yes, sir.

Q. To the extent of half the animals?

A. Yes, sir.

Q. When you took charge, Mr. Toponce, how many, if any, horses did the company own?

A. When we first organized the company the company didn't own any horses. Mr. Kerr and I owned a lot of horses individually; we turned them into the company; at the time of the purchase he turned in his, and I turned in mine, and the first cattle we owned belonged to me that I turned into the company.

belonging to Mr. Kerr, and the books will show how many there were turned over.

Q. When you took charge of the business as the manager did you make any inventory at the time of the cattle, horses, farm implements, wagons, and other appliances for the business?

A. I think we did.

Q. You did?

A. Yes, sir. I reported them, and I think we got them on the books of the company.

Q. But you don't now remember in regard to the horses?

A. Not the exact number of mares and geldings, two-year-olds and three-year-olds.

119 Q. Go back now to the increase in the herse band for '83—you say you can tell how many colts were dropped in '83?

A. Oh! I say I can't tell exactly; probably twelve or thirteen that was raised.

Q. Did you make a round-up of the band in the year '83, and brand the colts?

A. I did not; Mr. Owsley did.

Q. It was your duty to see to it?

A. Yes, sir. I had it done.

Q. But you wer-n't present when it was done?

A. Some of the time I was.

Q. How many colts were branded in '83?

A. I told you I couldn't state.

Q. Did you know at the time?

A. Yes, I think Mr. Owsley told me what it was.

Q. How many mares came in to be branded in '84 in addition to the twenty of the original stock of mares?

A. I don't know that.

Q. Wasn't it important, as manager of the company, that you should know that?

A. I had a man there——

Q. I don't care anything about your man.

A. He was taking care of them.

Q. I'm testing your capacity as manager and what your services were worth, and what you did or omitted to do.

A. I don't know how many mares there was.

Q. Were any of the twenty mares of the original stock sold in '83?

120 A. No, I don't think there was any sold. I think we had one or two killed.

Q. Were they in condition for breeding?

A. Yes, sir.

Q. I come back to the question as to how many mares and colts there was turned over to the company in '83, that came into breeding in '84.

A. Well, I told you I couldn't answer that question, because I don't know how many foaled.

Q. Where were those horses ranged?

A. They were ranged up on Toponce's ranch.
Q. At what is called the home ranch?
A. Yes, sir; and wintered down in the barn in Corinne.
Q. Did you see the band of horses in '84 yourself?
A. Yes, sir.
Q. Did you make any count of them?
A. No, sir.
Q. Did you have a round-up in '84 to bring in the colts?
A. Yes, sir.
Q. Were you present?
A. Some of the time.
Q. Did you take any count?
A. Mr. Owsley kept account.
Q. Did he give the account to you?
A. Yes, sir; he told me how many colts he had branded.
Q. How many did he brand in '84?
121 A. I don't recollect; probably twenty to thirty.
Q. In '84?
A. Yes, sir.
Q. And I understand you to say about twelve or fifteen in '83?
A. I think that would be right.
Q. How many mare colts did you brand in '84?
A. We didn't keep count of them separate.
Q. Let's go to '85. How many brood mares had you in your band of horses in '85?
A. We lost some horses, sold now and then a horse and sent some to the sheep herd; sometimes they was with the sheep and sometimes they were here.
Q. I ask you how many brood mares you had in '85, original and increase?
A. I told you I didn't know.
Q. How many colts were branded in '85?
A. I couldn't say, exactly.
Q. Going back to '84, from your experience in ranching horses, how much increase in mare colts in '84?
A. I don't know that.
Q. Give it up?
A. Yes, sir.
Q. How much increase in mare colts were there in '85?
A. I told you I didn't know.
Q. Do you know for '86?
A. No, sir.
122 Q. Or '87?
A. No, sir; I wouldn't swear to the number.
Q. You didn't consider the horse part of the enterprise as very important?
A. Yes, sir.
Q. Why did you not look at it more particularly and find out these facts as I am asking you?
A. I had a man there and he took care of the ranch and I'd say

how many were branded and he would probably tell me; he knew every horse.

Q. So the information you had was hearsay from Owsley?

A. Yes, sir. I used to have the horses at Corinne very frequently.

Q. Wouldn't it be proper business to have a correct inventory so near as it could be had of every mare of that band of horses returned to you so the directors and secretary might know?

A. I think it would.

Q. Wasn't it part of your duty, as manager?

A. It was a part of my duty, if it was called for. When Mr. Kerr called for a statement of the horses——

Q. Let Mr. Kerr alone; I'm talking about the company.

Mr. ROGERS: We submit he's answering the question.

The COURT: Answer directly the questions put and those only. Your counsel will give you a chance to make explanations afterward.

123 A. Yes, sir.

Q. And you didn't do it?

A. No, sir.

Q. Didn't you ever make a return to the company as to the number of horses on the range owned by the company?

A. Yes, sir.

Q. When?

A. In '87.

Q. What number did you return?

A. I couldn't say the number now; something like two hundred and something.

Q. Is that the nearest you can come at it?

A. Yes, at present.

Q. Did you superintend the counting at that time?

A. I counted some of them.

Q. What time in the season was it the custom of your company to make a round-up of the horses?

A. We counted them when we moved them from the summer range to the winter range; going either up or down.

Q. Did you in '87, yourself, count the horses or attend the round-up?

A. I attended part of the time.

Q. From what data did you furnish the report in '87?

A. From the foreman and myself.

Q. How many did you count?

A. I think we counted out two hundred and some odd.

124 Q. Where did you personally make count of any of the horses?

A. Right in my own corral.

Q. How many?

A. Different bunches; sometimes we would run in ten or twenty as we could get them.

Q. How many altogether did you count in your own corral?

A. Probably twenty or thirty little bunches.
Q. And that's all you counted?
A. That is all I counted individually, yes.
Q. Did you know where the horses were ranging?
A. Yes, sir.
Q. Did you ever go to the range and have a round-up at the range?
A. Yes, sir.
Q. In '87?
A. You never could count them on the range without a corral.
Q. Well, did you count them in a corral on the range?
A. Yes, sir.
Q. When?
A. Oh! At various times. Probably counted them fifty times at the ranch when we'd get them in a corral.
Q. At what time in '87 did you give to the secretary a count of the horses owned by the company?
A. In the fall when we was moving them from the summer range.
125 Q. October, wasn't it?
A. Sometime in the fall.
Q. When did you go out of the service of the company?
A. December, I think.
Q. December of what year?
A. '87.
Q. Did you count the horses out, or deliver any given number to your successor?
A. No, sir; they were in the field. They had been counted and scattered, and when they put me out of office I just stepped out and they took charge of the horses.
Q. Do you know how many horses were on the range when you stepped out?
A. I think the books will show; I don't recollect. I think all the horses the company owned, including the Wyoming horses and some horses let to some parties to work, altogether the company owned about two hundred head.
Q. To your knowledge were any of that band of horses sold from the first day of October, '87, and the 1st day of February, '88?
A. Yes, I think there was some sold in November.
Q. Did you sell them?
A. Yes, sir.
Q. How many, and to whom?
A. I sold two or three head to Jensen, at Brigham city.
126 Q. Any more?
A. No, sir; not during that time. I think in the summer I sold some to a man named Green.
Q. When?
A. Sometime in the spring of '87.
Q. I'm referring to the time after your account in October.
A. No, there was no horses sold, I think, after that.
Q. None at all?

A. Not unless these four head.
Q. Not more than four head?
A. Not more than four or five. I don't recollect whether we took them out before the count or not.
Q. Do you know of any part of that band of horses being driven to Idaho after October?
A. No, sir.
Q. Where were those horses in October? Where were they ranging?
A. They were ranging on the range up by the old Toponce ranch. I don't think that we put them into the field until later in the October. We might have commenced putting some in the field in the 1st of October. I don't recollect the last time. As we could catch the horses we put them in the field.
Q. For whom?
A. For Mr. Kuhn.
Q. Any for Owsley and Toponce?
127 A. No, sir. Owsley and Toponce only owned three or four horses.
Q. Were you present at the branding of the colts in '87?
A. Some of them.
Q. Where were they branded? Where did the round-up take place?
A. At the home ranch.
Q. That's where Owsley lived?
A. Yes, sir.
Q. How many at one time did you have in the corral when you were present?
A. I couldn't say. Sometimes we would have thirty or forty head of horses in the corral; sometimes not more than fourteen or fifteen.
Q. Did you during '87, at any time, see any colts branded?
A. Yes, sir.
Q. Belonging to the company?
A. Yes, sir.
Q. How many?
A. I don't recollect exactly how many.
Q. About how many?
A. Probably a dozen; maybe more and maybe less, I can't recollect.
Q. Mr. Kuhn had a man there branding colts for him?
A. Yes, sir.
128 Q. You can't state the exact number belonging to the company on the range?
A. No, sir; only from the books of the company.
Q. Mr. Owsley lived there at the ranch sometimes known as the Toponce ranch?
A. Yes, sir; that is, the last winter he lived there he lived up in town, and took care of the horses in the field.
Q. When was that?
A. Winter of '87.

Q. Winter of '86 and '87, or the winter of '87 and '88?
A. '86 and '87.
Q. The ranch was a desert entry, was it?
A. No, sir; not the ranch itself; it was a pre-emption.
Q. What?
A. The ranch was a pre-emption. The desert entry was placed on that to protect it by Mr. Owsley; I had him do it for the company.
Q. Make a desert entry?
A. Yes, sir.
Q. Over a pre-emption?
A. No, sir, it wasn't over a pre-emption.
Q. Why do you say, then, that the home ranch where he lived was under a pre-emption entry?
A. It is. I got a patent and turned it over to the company.
Q. You know where the spring is that furnishes the water to the house?
129 A. Yes, sir. I think I ought to, I've lived there eighteen or twenty years.
Q. That is a pre-emption entry, is it?
A. It was according to the survey when the entry was made, but since the new survey I don't know where it is.
Q. While you were manager, or claimed to be manager, did you not appear as a witness for Owsley to prove up a desert entry on the home ranch, where he has his barn and stock?
A. I did not. I appeared to prove upon a desert entry to the remaining portion of the section.
Q. Was that land that you appeared as a witness to prove up on a part of the company's land occupied by it?
A. Yes, sir, occupied by it, and the company put up the money for the desert entry, too.
Q. Did it cover the spring and house?
A. No, sir, not according to the original survey. The spring and the house was on my patent.
Q. I understood you to say, yesterday, that you spent most of your time in the business of the company?
A. I done whatever business had to be done. I stated, I believe, I was away one month in California and ten days I was in Wood River.
Q. In what did your duties mainly consist?
A. Well, in chasing around after the sheep and horses, and
130 trying to protect that land and sell the land which we had purchased from the Central Pacific railroad, digging ditches, tending to running the mill, furnishing water down to run the mill, and the general business of the company.
Q. It don't seem to have been in your line of business to count the horses?
A. I counted them pretty often.
Q. And you don't know how many cattle you had on the ranch at any time?
A. Yes, sir. At one time we sold to Owsley we had twelve head.

Q. Where did you report in '86 that you had fifty-six head?

A. We had fifty-six head that I bought for the company, and when we came to pay him for them Mr. Kerr wo'ldn't put up, and I had to buy a half interest; he had to make payments on the land. Mr. Kerr wouldn't take the cattle after he told me to buy them.

Q. Did you make an arrangement with Owsley about pasturing the cattle?

A. Yes, sir.

Q. Was it changed at the time you acquired a half interest in the cattle?

A. No, sir.

Q. Did you as manager for the company, or assuming to act as manager, ever make a return to the company of the cattle which Owsley was pasturing on the company's land?

A. Yes, sir.

131 Q. When?

A. I returned the first bunch he had, and the next year he returned his increase. He only had twenty-six head originally, and then his increase the next year. The arrangement we had with the men we herded for was that we didn't count anything under yearlings. I made a contract with Mr. Owsley to herd his cattle for twenty cents a month.

Q. Did you render a statement to the company showing how many cattle Owsley and Owsley & Toponce were pasturing?

A. Yes, sir.

Q. When did you make the first report?

A. I don't recollect.

Q. Was it in writing?

A. No, sir; I didn't do any writing. I reported it to Mr. Fowler and he charged it to him with a ranch bill against his wages.

Q. What year did you make your first report of Owsley & Toponce cattle?

A. I think in '84.

Q. How many did you return?

A. I think there was thirty-nine in the first report.

Q. Do you know whether any officer or director of the company made a count of the cattle then?

A. No, I think not; they might have, they was right there.

Q. You were relied on to make that count?

A. Yes, sir.

132 Q. Then it was to your interest to have the pasturage as cheap as possible?

A. Most assuredly it was.

Q. You say you made the first report of pasturage, in which you and Owsley were interested under your contract, in '84?

A. I think so.

Q. Did you make a count and return to the company in '85?

A. No, they had a count and Mr. Owsley was charged up monthly for his cattle on the books of the company.

Q. He never was charged for more or less than fifty-six head, was he?

A. I don't know. There was increase each year and some was sold out.

Q. But you made no count and made no return to the company after '84?

A. No, sir. Mr. Owsley came to me——

Q. No matter what Owsley said to you—you made no count and no return after '84?

A. I think he's charged up to '87.

Q. But you made but one return and that was in '84?

A. Yes, sir.

Q. How many head did you return then?

A. I think thirty-nine head.

Q. And didn't you make any return in '85?

A. He made his own return.

133 Q. Who?

A. Mr. Owsley made his return. He had so many head—fifty-six.

Q. Didn't you consider it your duty to inform the directors how many animals were pastured on their land?

A. No, sir.

Q. You didn't in '85?

A. No, sir.

Q. Did you in '86?

A. No, sir.

Q. Was the count made by you in '84 ever changed?

A. Yes. The count was changed from thirty-nine to fifty-six.

Q. When?

A. I can't say.

Q. You have some idea if you were manager of this company?

A. Mr. Fowler booked the account every month and I never paid any more attention to it.

Q. According to the original count?

A. Yes, sir.

Q. You gave no further information?

A. No, sir.

Q. Did the herd increase?

A. Very little.

Q. A little is something; how much did it increase in '85?

134 A. Probably ten or twelve head, something like that; and then there was some sold off. There has been a book account kept by Mr. Fowler with Mr. Owsley.

Q. But, I'm trying to find out what the manager reported to him? How many cows were there, how many bulls, how many two-year-olds and how many yearlings?

A. I didn't count them to know the classes; they was pastured so many head of cattle.

Q. About how many cows were there in that bunch in '84?

A. I couldn't say; I have no idea.

Q. I don't ask you for the exact number; give us as nearly as you can?

A. Probably one-third of them was cows.

Q. That would be twelve?
A. Twelve or fifteen cows.
Q. Well, then, one-third of fifty-six would be cows?
A. Maybe not more than a quarter—just as the herd happened to be.
Q. How many two-year-old heifers were there?
A. I don't know that.
Q. How many yearling heifers?
A. I don't know.
Q. How many bulls?
A. I don't know.

135 Q. Isn't it important that a ranchman, managing a business like this, should know, as near as practicable, what the herd consists of as to breeding animals? Doesn't good management require that?

A. I think not. When a man takes stock to herd all a man goes by is the brand.
Q. But here you are making a contract with yourself.
A. I wasn't making a contract with myself any more than with any other person. I paid the same as anybody else.
Q. Didn't it occur to you, as a director of the company, that you should make an absolutely correct return to your company?
A. Yes, sir.
Q. Did you think of that?
A. Yes, sir.
Q. Did you make absolutely correct returns?
A. Yes, sir.
Q. You returned them correctly in '84?
A. Yes.
Q. And you said just now to the jury that you can't tell how many cows there were and how many bulls, or how many two-year-olds, or how many yearlings?
A. No, sir, I can't tell you. When you take cattle to herd the brand is all we went by, so we didn't count two-year-olds so many, or so many three.

136 Q. Now, you see clearly enough that it is necessary for this jury to know how many cows, and how many bulls there were, and how many heifers coming into breeding, in order to tell what the increase was in '85, and '86 and '87; now, can you tell what the condition of the cattle was in '84, as to breeding qualities?

A. I can't tell exactly.
Q. And in '85 you made no count?
A. No, sir.
Q. Did you make any round-up and brand any calves?
A. Mr. Owsley done it.
Q. And you don't know anything about it?
A. No, sir.
Q. The contract you made with the company was to pay so much a head for pasturage?
A. Yes, sir.

Q. If you turned in fifty-six in '84 there would be more in '85?
A. Yes.
Q. But you didn't give in a report in '85?
A. The company knew it.
Q. I suppose the board of directors might have counted them?
A. Yes, sir.
Q. Why didn't you count them in '85?
A. Mr. Owsley reported them; he's been charged up on the ranch book up to '87.
Q. How many head?
A. On all the cattle he had at the time; he bought a lot of cattle afterward.

137 Q. What information did you, as manager of the company, give in as to the amount of Toponce & Owsley cattle after '84?

A. They never was known as Toponce & Owsley cattle; I advanced him the money on the cattle, and when he sold the cattle I was to get the money; and if he bought on, he mortgaged it; it was known as the Owsley cattle all the time.
Q. Had the company, in the ordinary course of business, any means of ascertaining how many cattle were being pastured on company lands except through you as manager?
A. Yes, sir; they had plenty of means.
Q. How?
A. They could go out to the range the same as I did.
Q. Did you consider it your duty to keep the company advised in that respect?
A. Yes, sir.
Q. Did you keep them advised?
A. Yes, sir.
Q. Go back to '85; how many cattle owned by Owsley and Toponce, and pastured on the company ground, were returned in '85?
A. I tell you I didn't return them any more; they charged it right along.
Q. Did you return them in '86?
A. No, sir.

Q. Was there increase on '85?

138 A. There was.

Q. Was there increase from '85 to '86?
A. I think there was.
Q. How much?
A. I can't say.
Q. Was there increase from '86 to '87?
A. I think there was.
Q. How many cattle did Owsley and Toponce own on the company's range in '87?
A. I think they had something in the fall of '87 something like a hundred head.
Q. Did you ever pay or did Owsley & Toponce pay pasturage for a hundred head?

A. No, sir, I don't think they did.
Q. Did you ever pay pasturage for more than fifty-six head?
A. I can't say positively.
Q. How came it to be charged in that way if the manager returned the account?
A. He returned the account himself.
Q. Never more than fifty-six head?
A. I don't think he had more than fifty-two head at any time in '87, when he bought some from Mr. Tyler.
Q. I understood you to say that you had charge of the purchase and sale of all lands in which the company were interested? Is that true?
A. I didn't say that. I say my business was to buy and sell land.
139 Q. And, yesterday, I understood you to say you negotiated with the Central Pacific Railroad Company for the purchase of the company land?
A. Most of it was done by Mr. Fowler.
Q. And I think you said something about you having of these desert-land entries which were the first lands which the company had any interest in?
A. Yes, sir.
Q. You had complete charge of that, hadn't you?
A. Yes, sir.
Q. And I understood you to say *in* all of those entries had been abandoned and lost to the company except three? Is that true?
A. No; you didn't understand me to say that.
Q. How many of those entries are still alive?
A. I said there were three we had got final proof on. Seven are still alive.
Q. The balance are all cancelled?
A. Yes.
Q. All cancelled?
A. No; there are seven or eight alive.
Q. You are quite sure about that?
A. There was two or three days ago.
Q. How many of these entries have been cancelled and lost to the company?
A. Probably five or six sections.
Q. How many desert entries did you take charge of in '83, when the company was organized?
A. I don't recollect, exactly.
140 Q. About how many?
A. We didn't get them all at once.
Q. Altogether how many desert entries were made of which you got proof?
A. Twelve or fifteen.
Q. Wasn't there thirty-three?
A. Afterwards.
Q. I mean altogether; the desert entries?
A. I wouldn't be positive as to the exact number.

Q. Well, tell us as near as you can?

A. I think somewhere near about that; some was for three hundred and twenty and some for a full section.

Q. How much acreage did those entries cover in total; I mean the first entries, the first lot of entries?

A. They must cover something like eight thousand acres.

Q. And how many entries?

A. About twenty in the first batch.

Q. How many were made afterwards?

A. I couldn't say how many, because they was made at different times.

Q. As near as you can, how many?

A. I think something about thirty desert entries.

Q. Those entries all lapsed, did they not?

A. No, sir.

Q. Didn't they all lapse and some were re-entered?

A. Yes, sir.

141 Q. Cancelled?

A. They were attacked and cancelled.

Q. All the original entries?

A. No, sir; some of them were attacked and just slipped by and the company never re-entered them.

Q. How many of the original entries went by in that way?

A. I think there was eight desert entries that were attacked and cancelled and relocated again by the company, and afterwards they lost a portion of them.

Q. And the other entries, making up thirty-three, are still pending?

A. Some of them are and some of them are not; some the time has expired on, but have never been cancelled.

Q. The time has expired on them all?

A. No, sir.

Q. I me-n on the original entries?

A. Yes, what hasn't been made sure.

Q. How many re-entries have been made?

A. I -hink we made ten.

Q. This is true then, Mr. Toponce, that all the money paid by the company on those original desert entries is lost to the company?

A. No, sir.

Q. How much of it?

A. I don't think they have lost anything; I think they have more land than they're out.

142 Q. Do you mean to say they received patents for any desert entries?

A. They have got final proof.

Q. For how much?

A. For about two thousand acres.

Q. Any more than three entries?

A. Three entries.

Q. Three entries only?

A. Yes, sir.

Q. That would be three times six hundred and forty?
A. Yes, sir.
Q. Were they full entries—entries of sections?
A. Yes, sir, I believe they were; one is twenty, the other is eighteen and the other is thirty.
Q. Mr. Toponce, when did you say the claim that Owsley has against the company for board was transferred to you?
A. I bought it last spring.
Q. How much did you pay for it?

Mr. KIMBALL: I submit that's immaterial.
The COURT: What is the object?
Mr. BENNETT: It's to show the character of this man as manager.
The COURT: The objection may be sustained.
Mr. BENNETT: Enter an exception.

Q. Mr. Toponce, you charge in your bill of items two hundred and twenty dollars paid C. S. Varian. What suit was that in?
143 A. That was in these Johnston cases.
Q. I asked you what suit that was in.
A. I don't recollect the number of it.
Q. Well, there were several suits. There was one suit for cutting sheeps' throats, another case to replevin a lot of sheep for Mr. Johnston. Do you know what the suit was about when you paid that fee?
A. I think it was one that went to the supreme court.
Q. You don't remember what it was about?
A. I don't recollect what particular case it was.
Q. Can you tell the jury what the case was—what it was brought for?
A. No, sir. I couldn't state, positively, what suit it was.
Q. It was brought while you claimed to be manager?
A. Yes, sir.
Q. Then you can't tell what it was about?
A. I can't tell which particular one it was. I think it was an attachment, getting a lot of horses.
Q. You're going astray again; what was this suit in which Mr. Varian received this money?
A. I think for attaching a lot of horses from Mr. Johnson. The receipt we introduced in evidence shows the number.
Q. No, I ask you what suit you paid that $220 to Mr. Varian for—what litigation?
A. I say I think it was a case in attachment.
144 Q. Do you know?
A. Yes, sir; in some of them cases—he was employed in two or three of them.
Q. But you don't recollect the one in which the $220 was paid in?
A. Whenever I got money I paid it to him, the same as I did to Mr. Kimball.

Q. Then you can't recollect which suit it was that he earned the money you paid this to him for?

A. No, sir.

Q. The second item in your bill is, C. S. Varian, or Dickson & Varian, professional services in case of Duchenau *vs.* C. M., C. & S. Co., what was that suit about?

A. It was about some sheep.

Q. Well, what about the sheep?

A. Some sheep the company took of Duchenau's for trespass. He sued the company.

Q. The sheep were taken under your management, were they?

A. Yes, under my management.

Q. And you were beaten in the suit?

A. Yes, sir.

Q. The next item is, paid Dickson and Varian, in C. M., C. & S. Co. *vs.* Johnson, for professional services; in what suit was that?

A. I don't collect, he was employed in two or three and I don't remember which particular case I paid him for. I paid him the money as I got it.

145 Q. The next item of indebtedness is December 18, '86, paid C. S. Varian for services in case C. M., C. & S. Co. *vs.* Johnston, $70; what was that?

A. I don't remember which case it was in.

Q. When these suits were brought and when these moneys were paid, you claimed to be acting as manager of the company?

A. Yes, sir.

Q. So you can state to the jury what they were about.

A. Yes, I can state they were against Johnston were about, but I can't state to which suit the money was applied.

Q. But you make a demand here for these items, don't you know what they are?

A. I know what the suits were about.

Q. Tell me about that suit in which $70 was paid, you put it down there and signed it.

A. I put it down there on the case of Johnston.

Q. But what suit was it in?

A. I don't know. I know we had several cases and Mr. Varian was employed in two or three of them; but I don't know in which one he applied the money to.

Q. You say here that it is money paid to C. S. Varian in case C. M., C. & S. Co. *vs.* Johnston?

A. Yes, sir.

Q. What suit was it, and what was the subject of the suit?

146 A. We had a replevin suit for cutting sheeps' throats, and for stealing horses, cutting wire fences and various other suits. I can't name them all.

Q. Keeping to this one in question, you say you can't tell me which one it was?

A. No.

Q. Take the next item, paid C. S. Varian for professional services

in case C. M. C. & S. Co. *vs.* Johnson and Holmes, $100; what was that for?

A. Same cases; he was employed in those cases.

Q. You don't know what suit that was in?

A. No, I can't tell what particular suit that was paid in.

Q. You have charged that $100 as paid in a suit of the companies, against Johnston and Holmes; is that correct?

A. No, I don't think it is; I didn't have any lawsuit against Holmes.

Q. I think I read the item wrong, paid C. S. Varian for services in case of Ducheneau and House, $100. Do you know what that was for?

A. Yes, sir; for the sheep business.

Q. The same as referred to above?

A. Yes, sir.

Q. Paid F. H. Church for costs in case C. M. C. & S. Co., $9.67; what is that?

A. That should be a bill paid to Church; I don't think the bill shows for costs; I think it's for a bill paid to Church.

Q. In what suit?

147 A. I say it's not for costs of suit; it's for a bill of merchandise, I think you'll find, taken out of a suit that the company won when he was justice of the peace.

Q. The next item is, paid William Hadley for sheriff services in case C. M. C. & S. Co., $13.65. In what case was that?

A. In the case against Jim Allen, to recover a pasture bill.

Q. That was one of the case- you were to take care of yourself, wasn't it?

A. No, sir; it was a contract made with Mr. Allen.

The next item is August, '86, paid Carl Loveland for sheriff's services in case of C. M. C. & S. Co., attachment suit, $956.56. I'd like you to explain that to the jury.

A. Two hundred and eighty-seven dollars of that was paid by the company and I paid the balance.

Q. Well, then, this bill isn't correct, is it?

A. It can't be, for the company has got credit for the horses. Mr. Loveland held Mr. Johnston's horses in attachment suits nearly a year, and there was a lot of expenses.

Q. Where was that suit brought?

A. Right here in this court.

Q. When?

A. It was one of the first cases that was brought.

Q. Under your management?

A. Yes, sir.

Q. An attachment suit to recover moneys due on a contract?

148 A. No, sir; it was for killing a lot of sheep.

Q. That lead you, as manager of the company, to bring that suit?

A. I didn't bring it.

Q. Or have it brought?

A. The president of the company ordered it brought.
Q. To whom did he give the order?
A. Mr. Chase and myself.
Q. Were you present?
A. Yes, sir.
Q. You heard the order given?
A. Yes, sir.
Q. Where?
A. At the post office at Corinne, Mr. Chase's office.
Q. Did Johnston owe the company at that time?
A. Well, the company thought he did; he'd killed about 300 head of sheep.
Q. How long did Loveland hold the sheep under the attachment?
A. Those horses?
Q. The horses.
A. I don't know just how long.
Q. Well, about how long?
A. Well, there were two attachment suits, I think.
Q. Well, we were talking about this suit in which his bill was incurred.
A. That includes both of them.
149 Q. You mean to say that you had nothing to do with that suit?
A. Yes, I fought the suit; I took care of it here in court.
Q. The next item in this bill is January 4, '86, paid J. N. Kimball to pay cost in suit No. 548, Company *vs.* Johnston; which suit was that?
A. I don't remember whether it was the sheep-case suit or the horse-case suit or the ejectment. I had to run an account with Mr. Kimball, and I paid it whenever I could.
Q. Paid J. N. Kimball, to pay costs in case of Company *vs.* Johnston, $25; is that the same case?
A. I don't know.
Q. You don't know anything about it?
A. Yes, I know about the case, but I don't know what case it was applied to.
Q. The next item is paid J. N. Kimball to pay costs in the supreme court in the case of Company against Johnston, $125; what case was that?
A. I think that's the case in ejectment, if I recollect right.
Q. That was carried on under your management, was it?
A. Yes, sir.
Q. December 4, '85, paid J. N. Kimball for professional services in case of the company in the first district court, $50; that was on general account—professional account?
150 A. Yes, sir.
Q. July 9, '86, paid J. N. Kimball for professional services in various cases of the company in the district court, $400; that was on general account, for services?
A. Yes, sir.

Q. Commission on selling lands for C. M., C. & S. Co. in connection with J. K. Fowler?

Mr. KIMBALL: I introduced no proofs on that item.

The COURT: Is that part of the claim abandoned?

Mr. KIMBALL: It is not included within the complaint.

Q. Money paid out by plaintiff for the company in traveling from February 1, '87, to December 1, '87, $1,300. I would like you to explain to the jury how those items occurred.

A. Well, I simply charged at the rate of $300 a year for traveling expenses.

Q. Did you keep an account for moneys expended for traveling purposes?

A. Sometimes I did.

Q. Is that item of $1,300 made up from items you kept?

A. Some of it is and some of it is not.

Q. How do you arrive at the amount of $1,300 for traveling expenses?

A. When I was travelling back and forth I made an average for expenses.

Q. So it is simply averaged?

A. Yes, sir.

151 Q. It is not actual?

A No, sir.

Q. When did you commence traveling in the interests of the company?

A. I commenced traveling in the interest of the company as soon as it was organized.

Q. January, '83?

A. Yes, sir; some time in January.

Q. What do you mean by traveling—traveling on the ranch?

A. No; traveling on the cars to Salt Lake to fix up desert entries, and go and fight 'em. Going back and forth to Salt Lake City and to Ogden, fighting those cases against Johnston and everybody else; going to Wyoming to see after the sheep; going to Promintory and up through Nevada to see after the sheep.

Q. What portion of the $1,300 is chargeable to the land account?

A. I don't know; I couldn't say; the greater part is chargeable to suits account, I think.

Q. You are manager of this business; you ought to know how it was chargeable.

A. I couldn't say.

Q. About how much of that is chargeable to land account?

A. I should think about one-fifth; probably not more than one-sixth.

Q. How much to sheep account?

152 A. Probably about the same proportion; I had the sheep to look after and the lawsuits to look after. The sheep were in Wyoming and the court was here in Ogden, and I lived in Corinne.

Q. You say about one-third of it is chargeable to sheep account?

A. No, I didn't say one-third.

Q. Well, how much?

A. I say the whole business, including the land and the sheep and the suits.

Q. Well, I want you to itemize it; you said that one-third—one-fifth of it was chargeable to land accounts?

A. I said I thought about one-fifth or one-sixth would be chargeable to land account.

Q. How much to sheep account?

A. You can charge it with the other as much more.

Q. How much of that should be charged to sheep account—you say you went to Wyoming to look after the sheep and you paid traveling expenses; how much was your expenses in traveling in looking after the sheep?

A. I couldn't tell exactly; I didn't keep no account; it was made up on an average.

Q. So you can't answer that?

A. No, sir.

Q. How much of that was chargeable to cattle account?

A. I don't know; I didn't keep no particular account. I didn't have to travel on the railroad to see the cattle. I traveled with a team.

153 Q. Did you see after any of the Toponce and Owsley brand?

A. No, sir; he sold them himself.

Q. There were cattle sold, then?

A. Yes, sir.

Q. You don't charge anything by way of traveling expenses for looking after the cattle?

A. No; there is no charge for travel for the cattle or horses; the horses were running on the range and I didn't have to go on the railroad to get to them.

Q. How much do you charge for travel in regard to the big contract with the C. P. road and the purchase of lands from the C. P. Company?

A. I didn't charge anything. They gave me a pass to go down to California.

Q. So no part of the $1,300 is chargeable to the land, except the desert lands?

A. It might be, but it is not necessary for me to state here what.

The COURT: Answer the question if you can.

A. Yes, sir; I can answer it. Some of it was to buy out some man. I guess Mr. Bennett understands the word.

Q. You mean blood money?

A. That's it.

Q. That's part of the $1,300?

A. Yes, sir.

Q. How much is chargeable to blood-money account?

154 A. About $200 or $300.

Q. No more?

A. No, I think not.
Q. Who was that paid to?
A. I decline to answer that question.
Q. I want to know.

The COURT: Mr. Kimball, is there any reason for his declining to answer?
Mr. KIMBALL: I now of none.
The COURT to the witness: I don't see any reason why you shouldn't answer the question.

A. The whole reason is I hate to expose the man.
The COURT: You have made a charge against the company and it is trying to prove the incorrectness of the charge, and they are entitled to know to whom you paid the money.
A. I paid it to the man I bought the land from for the C. P. Railroad Company; I can't recollect his name.

Mr. BENNETT to the witness:

Q. That wasn't for traveling expenses, was it?
A. It might have been for him to travel.
Q. That's $300 out of the $1,300?
A. Yes, sir.
Q. So traveling expenses are limited down to a thousand; is that true?
A. Well, I expect that's right.
155 Q. I demand that you state to this jury what items make up that thousand dollars to traveling expenses.
A. I can't do it to make items.
Q. Well, if you can't do it accurately do it the best you can.
A. Well, it's for railroad fares and meals and stopping at hotels.
Q. When did you pay the first item of railroad fare after you took charge of this company's business?
A. The second month.
Q. Where did you commence paying railroad fare?
A. On the C. P.
Q. When did you pay the first item?
A. I can't tell you the day.
Q. What business were you on?
A. Lawsuits, I think.
Q. What lawsuits?
A. These lawsuits against Johnston.
Q. What lawsuit?
A. I can't tell you which was commenced first.
A. Where did you travel from and where to, on this first occasion?
A. From Corinne to Ogden.
Q. To see whom?
A. The court. I came down here to fight a lawsuit against Mr. Johnston.
Q. What suit was that?

A. I say I don't know exactly which came up first. I think the first was the sheep case.

156 Q. Do you mean to say, being manager of the company and being in charge of that litigation, that you don't know which came here first?

A. No, I don't; there was so many of them I can't tell.

Q. How much did you pay on that occasion for travelling and to whom?

A. I paid it to the railroad company, I guess, to the agent.

Q. Where?

A. At Corinne and at Ogden.

Q. When?

A. I can't tell you the exact date.

Q. Who was the agent?

A. Mr. Adams was the agent.

Q. How much did you pay?

Q. The fare was two and a half.

Q. Did you pay two and a half?

A. Yes, sir.

Q. What day of the month was that?

A. I don't know.

Q. Do you know what year?

A. I think it was '84; I can't tell exactly.

Q. So that was two and a half?

A. Yes, sir.

Q. I'm asking you now in detail.

A. I think that's about the first.

Q. And you paid two and a half?

A. Yes, sir.

157 Q. When did you pay the next item of traveling expenses in the company's business?

A. Well, I could not state just when it was. I was running back and forth from Corinne to Ogden and from Corinne to Salt Lake. I couldn't state the day.

Q. But make an account. I want to know how it is made up.

A. I told you I made it up on an average.

Q. Well, I don't feel quite satisfied with that. I want to see what basis you had in making that account. Now you have told of one case when you came to Ogden and paid two and a half railroad fare. When did you pay the next money for traveling expenses?

A. I don't recollect.

Q. About when?

A. Right along. I was going back and forth, sometimes two or three times a week.

Q. Well, do you mean to say to the jury that you are unable to give the items or any of the items making up that $1,300, except the blood-money item?

A. No, sir; I don't mean to say that.

Q. Well, then, give the items.

A. I can't give the items.

Q. You can give some?
A. I have given some.
Q. Give us the next.
A. Well, I went to Wyoming.
Q. Was that the next trip you made?
A. No, sir; I don't think it was.
158 Q. I want the next trip you made if you can remember.
A. I made several trips to Salt Lake on land business. Of course I didn't pay over the C. P., but I had to pay over the Utah Central.
Q. Do you mean to say you can't recollect what the second item was?
A. I mean to say I can't recollect. I'm not able to state right here to these men, that I paid a certain sum of money, positively.
Q. Can you state some item of traveling expenses, with day and date when you paid the money, and the amount you paid?
A. Yes, if you will give me time to go to the railroad office, I'll give you a receipt.
Q. I'm asking you now.
A. I can't do it.
Q. Out of a thousand dollars you can't give any item except one item of two and a half from Corinne to Ogden?
A. I traveled right on, week after week, and paid my expenses all the time. I might say there was another one or two and a half and another one of three dollars, going to Salt Lake and back, but I can't give you the date.
Q. Yet you were manager of the company, claimed to have been general manager and looked after the company's interest, and you can't give me those items?
A. No, sir.
159 Q. Do you consider that good business?
A. Well, it was my own money; I wasn't paying out any of the company money; and there was an item of railroad fare going to Blackfoot with some sheep on the Utah Northern; I can't tell the date, but I think the books show when the company received their money.
Q. The item, then, which you charge against the company for traveling expenses is simply an arbitrary item made by you, and is not made up of items of money actually paid out?
A. Yes, sir. It is made up of money paid out, but I kept no account.
Q. You made a kind of general average?
A. That is the way the account is made up.
Q. So you are not able to make any other items?
A. Yes. I paid out money for going to Wyoming and to Soda Springs on sheep business, but I can't tell the dates.
Q. Can you recall how much?
A. I can tell what the railroad fare was.
Q. You have rendered bills frequently to the company for traveling expenses and been paid?
A. Yes, some.

Q. Have you ever rendered any bill for this thirteen hundred dollars or any part of it to the company?

A. I don't think I did.

Q. Never until you brought this suit?

A. No, sir.

Q. Never till you gave us this bill of items?

160 A. Not for any of them items. I've rendered bill to the company and I think I've some credits on the books for some bills.

Q. You don't know of any impediment in the way of rendering your bills for traveling expenses to Idaho and Wyoming, do you, and receiving payment?

A. No.

Q. Why did you delay, then, till this suit was brought to make that bill?

A. Oh! because when I rendered a bill it was never put on the books until Mr. Kerr came up; nobody had any authority to pay out any money but him.

Q. Well, that didn't hinder you from rendering the bill did it?

A. I handed them in with a lot more that have not been paid, a good many of them can be found.

Q. This service commenced as far back as '83, didn't it?

A. Yes, sir.

Q. You claim that the company owes you moneys paid out for traveling expenses in '83, don't you?

A. Yes, sir; in '83 I think it commenced with *the* this company. Me and the president of this company was doing business before '83; before this company was organized.

Q. This bill is not made out against the president, but against the company?

A. Yes, sir; against the company.

Q. And you rested from '83 through all the years to '87,

161 and into late in the year '88, befor- you presented this bill; is that true?

A. Yes, sir; that's true. I presented a lot of other bills, which includes this bill.

Q. Did you present a bill due to the company for pasturing your cattle?

A. No, sir; they charged it to Mr. Owsley. They wasn't pasturing no cattle for me; I wasn't known in the transaction. They charged it to him on his monthly statement, or quarterly, I don't know which.

Q. The next item to the $1,300 we find is this: To money paid out on defendant's cost bill, in case C. M., C. & S. Co. *vs.* William Johnston, $129. It don't say who it is paid to. I will ask you to explain this to the jury, and in what case that money was paid?

A. It was one of those Johnston cases that Mr. Johnston beat the company; I think it was paid to Mr. Marsh.

Q. Well, what case was it?

A. The case that was appealed to the supreme court; I don't remember the number now; I think it was the case in ejectment.

Q. You testify you don't know?
A. Yes.
Q. It was in that case?
A. I think it was in that case.
Q. Was it or was it not in that case?
A. I would not be positive, because there's so many cases
162 I paid to Mr. Kimball that I don't remember, but I think the money was paid to him and he paid it to Mr. Marsh.
Q. Didn't you think it your duty, as manager, to know, particularly, upon what account you paid those moneys?
A. Yes, sir, he receipted for it.
Q. Oh! you don't answer my question?
A. Yes, sir, I knew that I had his receipt for it and I didn't charge my mind with it. I suppose I can look and see what case it was.
Q. But you don't now remember?
A. I think it was in this case; this is the only case we got beat on. It might, possibly, be the cutting-throat case; we got beat on that.
Q. The next item is to money paid out, expenses of plaintiff in last-mentioned case; that is the case of the company against Johnston, $75.00. What case was that?
A. I think it was the same case. It's either the case in ejectment or the case of cutting these sheep's throats, and I won't be positive which.
Q. Did you ever know which was paid in?
A. Yes, sir; my attorney attended to it.
Q. Your memory is not good, is it?
A. Yes, it is pretty good, I think.
Q. But you can't tell in what case that money was paid—$75?
A. No, I think it is the same case; that's all I can say. I could not say positively, because I don't recollect.
163 Q. Have you any memorandum, or any book or writing in any form as to that $75?
A. I have not; but when this bill of items was asked for, for what sums were due, Mr. White got the information from the clerk's office.
Q. How long ago was that, that you looked at the records and fixed that item of $75?
A. I think that Mr. White took them off the records here in the last term of fifteen days, whenever the bill was sent down.
Q. You didn't do it yourself?
A. No, sir; he went to the record himself.
Q. So this bill wasn't made by you—this bill of items?
A. That last bill of items—the court items wasn't made by me; by my attorney.
Q. So that you had no knowledge, at the time this bill of items was rendered?
A. Yes, sir; he told me I paid so much for court costs. I said to him, You're sure they're right? and he says, Right.
Q. That is all the knowledge you had?

A. I knew I paid the money out.

Q. And you acted upon that information?

A. Yes, sir.

Q. The next item is, Paid J. W. Pike, reporting testimony and transcript in the case of The Company *vs.* Johnston, in the district court, $80.00. What case was that paid in?

164 Q. That was paid in the case that was appealed—the case of Johnston—I don't know what case; I think that was the ejectment case.

Q. Money paid sheriff for serving summons in attachment, $11.00. What case was that?

A. The same case—the Johnston case.

Q. There was half a dozen Johnston cases; which one was it?

A. As I stated before, I couldn't tell you. I couldn't separate them.

Q. Cash paid to defendant on cost bill in Company *vs.* Johnston, $122.90. What case was that?

A. The Johnston case the company lost; we had to pay the costs.

Q. Which Johnston case was it?

A. I couldn't state which Johnston case it was. By looking at the records perhaps you can tell.

Q. To cash paid defendant for cost bills in case of Company *vs.* Johnston for defendant, $295. In what case was that?

A. I don't know; it was one of the Johnston cases. I couldn't state which one it was.

Q. When was that paid?

A. The records shows; I can't tell you.

Q. Cash paid witnesses in the same case, under the $285 for plaintiff, $75; what case was that paid in?

A. Same as the other. I can't tell the number of that case now.

165 Q. Now, I call your attention back to another item—money paid witnesses of plaintiff in the last-mentioned case; the last mentioned was a case against Johnston, $75; are those duplicate items?

A. I don't know; I could not say. We got all those items from the record of the court.

Q. The record shows the date, do'sn't it?

A. I suppose it does.

Q. You can't tell whether those are duplicate or not?

A. It would look as though it was.

Q. The next item is costs paid defendant Johnston, in case of The Company *vs.* Johnston, $48.95; I'll ask you to explain that to the jury?

A. The same as the other. I can't tell anything about that. It is the same as the others taken from the records of the court here.

Q. Costs paid defendant Johnston, in the case of The Company *vs.* Johnston, $19.70; can you tell anything about that?

A. No, sir; not any more than I can about the others.

Q. Costs paid defendant, in the case of The Company *vs.* Stark, $28.70; can you explain that to the jury?

A. No, sir; not any more than in the others; it's a case against Stark by the company, and the company dismissed it for something like that; they paid the costs.

Q. Was that an appeal case from the justice's court?

166 A. No. I think it was commenced in this court.

Q. Although you were manager, you don't remember much about these suits, do you?

A. I don't remember much about the costs because they were on the records.

Q. But you say you paid this money out—four thousand eight hundred odd dollars and you can't tell the jury as to any given item you paid out or when you paid it?

A. It went through the hands of Mr. Kimball.

The COURT: Is that a part of the account where those receipts that were introduced by Mr. Kimball allude to?

Mr. BENNETT: It is.

Q. Under date of January 11, '85, you have an item for feeding colts for defendant—twenty-five head of yearling cattle, at twelve cents each, from January 1st to March 10, '83; that's the item you testified to yesterday?

A. I didn't testify about feeding any cattle for the company.

Q. I'm reading from the bill furnished us; isn't it correct? It says, twenty-five head of yearling cattle at twelve cents each, from some date I can't make out, to March 10, '83. That item is not correct then?

A. It isn't so far as cattle is concerned; it's for twenty-five head of sucking colts.

Q. That is the same item you testified about yesterday?

167 A. Yes, sir; but I didn't understand. The other bill reads colts.

Q. Which bill?

A. The one my attorneys got.

Mr. KIMBALL: I called your attention to that yesterday.

Q. So that item should read twenty-five head of yearling colts?

A. Yes, sir.

Q. That would be right?

A. Yes, sir.

Q. Feeding for defendant two stud horses, two years old, from January 1, '85, to March 10, '85, $60; where were those stud horses kept?

A. In Mr. Guthrie's barn.

Q. The same year you stabled the colts?

A. Yes, sir.

Q. How do you make up that item of $60?

A. I charged them so much each for furnishing the feed and stable room.

Q. Well, as in the other case, you kept for that purpose a feed stable?

A. No, sir.

Q. You kept a feed stable and charged them so much a head for feeding?

A. Yes, sir; I think there is three stud colts there, two dollars apeace, and the sucking colts twelve dollars apeace.

Q. At this time you were claiming to be manager of the company?

168 A. Yes, sir.

Q. So you fed the studs between January 1, '85, and March 1, '85, and charged $60 for it?

A. For three of them, yes, sir; twenty dollars apeace.

Q. And you fed three sucking colts the winter of '84 and '85 for $60?

A. Yes, sir.

Q. The stabling and feeding of the colts, then, was before the stabling and feeding of the studs?

A. No, sir; I fed the sucking colts and the two-year-olds and the next winter I fed the others. The first time I fed them the company paid for the man that took care of the colts, and I just merely furnished the stable room to tie them up in and the feed for them, and the next winter I furnished the man who took care of them.

Q. How long did you feed the sucking colts?

A. The first ones?

Q. The ones named in this item?

A. There is two lots; I fed one lot one winter and one the next.

Q. Here are three, and the other twenty-five; I refer to the three.

A. I kept them from the time we took them up in the fall till in the spring when the grass got big enough.

Q. How many months?

A. Probably two or three months.

A. And for that you charge $60?

169 A. Yes, sir.

Q. Feeding sheep with hay for defendant from January, '85, to December, '87, $34; how many sheep did you feed?

A. I didn't feed them; I furnished the hay for them. I went and bought the hay and paid for it.

Q. That item is thirty-four dollars?

A. Yes, sir.

Q. How much hay did you furnish, and at what cost?

A. I think it cost about ten dollars a ton; I furnished about three tons and a half; I delivered it to Mr. Pitt.

Q. Feeding sheep and saddle horses between January 1, '85, and some time in '87 for defendant?

A. I think you find from '85 to '88. You said feeding sheep. I've got no claim for feeding sheep.

Q. I'm reading it from your bill.

Mr. KIMBALL: I make no proof on that item.

The COURT: That's out.

Mr. BENNETT to the witness:

Q. Feeding teams of defendant from February 1, '86, to December 1, '87, $660.00?

A. Yes, sir. That is the team and saddle horses.

Q. You explained that yesterday?

A. Yes, sir. The team I used myself—the saddle horses Mr. Owsley used.

Q. I'd like to know how that item of $660.00 is made up.

170 A. It's charged so much money for the team and the man taking care of the stock.

Q. Well, were the animals fed during all that time, from February 1, '86, to December 1, '87?

A. Yes, sir. My team was in the barn all the time unless I was up to the ranch.

Q. That is like all the other items for feeding the animals, a charge of so much to stable account for feed?

A. Yes, sir, for feed and a man to take care of them; the company discharged the man they had taking care of the company barn.

Q. It's not based on the hay furnished and purchased and the oats purchased?

A. Yes, the actual expense for the boy taking care of the team.

Q. Did you purchase the corn and charge it to the company or did you just charge up so much a day to make up this $660.00?

A. Yes, I charged so much a day at livery stable figures.

Q. Your account doesn't contain items for hay and corn so much a hundred pounds, but is averaged as so much a month or day?

A. Yes.

Q. That is what you mean; you charge the same as a livery stable, but you haven't charged for specific grain?

A. No.

171 Q. I want you to thoroughly understand me, the count in the complaint is for hay and grain furnished and not for stabling?

A. No, sir.

Q. Paid Luce for handling stud colts, $50 00, without date. When was that?

A. That was some time in '86, I think. I can't tell you the exact date. I could find out, though.

Q. Well, let the jury know what you mean by handling.

A. He was breaking the stud colt for the company—a fine horse. He had him down here. I made arrangement with him to pay him $80.00 for three months or two months and he was to break him and I paid him the $50.00 and the company paid him the balance through Mr. Kuhn.

Q. You mean break him to harness?

A. Yes, sir. He's the property of the company to-day.

Q. How many men had you in charge of the horse herd?

A. Sometimes I had two and sometimes only one.

Q. Competent men?

A. Yes, sir. I didn't think they was competent enough to break them kind of horses.

Q. You trusted those men in the business of the company?

A. Yes, sir.

Q. You went on the ranch?

172 A. Yes, sir.

Q. You considered them at the time competent men to handle those horses?

A. Yes, sir.

Q. Mr. Toponce, you had charge of the litigation of the Corinne Company, had you, while you were manager?

A. Yes, sir.

Q. And you had litigation with a man named William Johnson?

A. Yes, sir.

Q. When was the first suit brought by the company against William Johnson, or by him against the company?

A. I couldn't tell you the exact date, some time in the summer.

Q. What was the cause, and by whom was the suit brought?

A. I think it was brought by me—the first suit we had against him.

Q. What was it for; what was the cause of action?

A. I think it was trespass; cutting hay on the company's land.

Mr. KIMBALL: I think the record would be better evidence of when it was brought, and by whom it was brought and what the cause of action was.

The COURT: Is it for the purpose of proving the cause of action?

Mr. BENNETT: To prove his capacity as manager.

173 The COURT: Go on.

Mr. BENNETT, to the witness:

Q. Do you remember what the cause of action was in the first case?

A. No, sir.

Mr. KIMBALL: I object as not proper cross-examination, and immaterial if original.

The COURT: This is asked, as Mr. Bennett explains, for the purpose of showing to the jury what kind of services he rendered to the company. I apprehend that Mr. Bennett won't go into the details of that more than is necessary.

Mr. KIMBALL: I except to the ruling.

Mr. BENNETT, to the witness:

Q. Do you order suit brought?

A. I don't know.

Q. The first suit?

A. I don't know if I ordered the first suit brought, or the second or the third.

Q. You said you had charge of the litigation?

A. Yes, sir; I defended it.

Q. Now, this suit was brought while you claimed to be manager of the company?

A. Yes, sir.

Q. Do you mean to say to the court and jury that you can't now tell what the suit was brought for?

A. No, sir; not the first suit. There was, I think, pro-ably a dozen suits, maybe more.

Q. You don't know how many?

174 A No, I couldn't tell without going to the records.

Q. Could you tell if you looked at the record?

A. No, sir; only if some one read them off to me.

Q. You say there was quite a number of suits brought, how many?

A. Well, I say there was five or six suits brought against Johnston—maybe seven. There was some little suits brought for trespass—cutting hay, killing sheep, taking sheep to the stray pen, taking horses, and I don't know what they all were—that is, which one was first.

Q. Well, did you know at the time?

A. Yes, sir. I think I did.

Q. Do you mean to say you have forgotten?

A. Yes, sir. I mean to say I couldn't say positively which one of the suits was brought up first, whether these tresspass suits, or in ejectment, or for killing sheep.

Q. You brought the suits?

A. Not all of them.

Q. You ordered them brought, didn't you?

A. Yes, sir.

Q. Simply on your own motion?

A. No, sir.

Q. How otherwise?

A. The suits that was brought was ordered by the president—all the principal cases.

Q. Which cases?

175 A. Those Johnston cases, such as replevin, or ejectment on land, cutting sheeps' throats and for attaching those sheep for putting those sheep in the stray pen.

Q. Well, about the attachment suit?

A. The attachment suit also.

Q. Ordered by the president?

A. Yes, sir.

Q. Then you didn't tell the truth when you said you had charge of the litigation?

A. I said I had charge of them here.

Q. Why do you say, just now, the president had charge of them?

A. I didn't say the president had charge of them. I say he ordered them brought.

Q. I asked you this morning if you had rendered bills for your traveling expenses; I'm not quite sure what you answered.

Mr. KIMBALL: I submit the matter has been gone into about twenty-five different times on this cross-examination.

Mr. BENNETT: I'll waive it.

Redirect examination.

Examined by Mr. KIMBALL:

Q. Who were stockholders in the Corinne Mill, Canal & Stock Co. at the time of its organization?

Mr. BENNETT: I object; matter shown by record.

Mr. KIMBALL: Produce the articles of incorporation, then.

Mr. BENNETT: We will produce them.

176 Q. Now, what other stock, if any, was on that ranch beside the stock of the company?

A. We kept taking in herd cattle—cattle to herd for other parties—and horses.

Q. Whose?

A. Well, we took a lot of cattle for Mr. Myers and Dooley. We had horses for Mr. Shilling.

Q. How many did you have for Myers & Dooley?

A. I think we had a little over fifteen hundred head at one time.

Q. How many horses for Shilling?

A. I think some fifteen or twenty head. About thirty or forty head for Ad Kuhn. A lot of cattle for a man by the name of Regan.

Q. Where were they kept?

A. They were kept on the ranch. We had some stock for Mr. Tarpey, some for Mr. Hammond, and Mr. Patterson & Healy.

Q. Who do you say were the directors of the company in '83?

Mr. BENNETT: I object to that. Ask him if he was a director.

Mr. KIMBALL: You asked him who the incorporators were.

Mr. BENNETT: The books are at their service, but I don't care to take this witness'es answer.

Mr. KIMBALL: I think I have the right to re-examine on it.

177 The COURT: The books being here, if it is objected to I think they would be the best evidence.

Mr. KIMBALL to the witness:

Q. You say you sold twelve head of cattle for four hundred dollars?

A. Yes, sir.

Q. Was that the reasonable value of those cattle at that time?

A. Yes, sir. I think it was more than they was worth.

Q. You paid that money to me, you say?

A. Yes, sir.

Q. On what account, if you know?

A. On account of litigation here for the company.

Q. Where was Mr. Kerr during the time this litigation was going on?

A. Sometimes he was at Salt Lake and sometimes he was in Corinne, sometimes in California.

Q. Do you know how many meetings the board of directors had in 1883?

Mr. BENNETT: I object; the records will show. This man's recollection isn't good.

Mr. KIMBALL: I don't know whether the records will show or not. The records are in their possession.

The COURT: Are the records where they can be had?

Mr. BENNETT: They are here.

178 Q. On yesterday you spoke of John W. Kerr having a suit against the company. What do you mean by that? Was the suit personal or against the company?

A. Against the company.

Q. Do you know what the suit was for?

Mr. BENNETT: I object to that.

The COURT: What is the object?

Mr. KIMBALL: I want to know if he knew what it was for.

The COURT: How is it material that he should know about it?

Mr. KIMBALL: Here yesterday, in answer to Mr. Bennett, that at the time the suit was brought he didn't know of a $71,000 note having been given. I want to know about the time he heard of it, and how he came to hear of the note then.

The COURT: He has testified about that. You may ask him about that.

Mr. KIMBALL to the witness:

Q. When did you first hear of that note?

A. Some time in August, '87.

Q. Can you state what that suit was about?

Mr. BENNETT: I object. The contents of the suit is shown by the record—what it was about.

The COURT: Mr. Kimball, isn't it sufficient for your purpose to ask when he first learned what it was about?

Mr. KIMBALL to the witness:

Q. When did you first learn what this suit was brought for?

A. When the papers was served on me. I believe you then informed me.

179 Q. When the summons was served on you in that case?

A. Yes, sir.

Q. Well, you may state whether or not that was the first time you ever heard of that $71,000.00 note.

A. That was the first time I ever knew there was such a note as that in existence.

Q. That the first time you knew of the interest being charged on it?

A. Yes, sir.

Q. You spoke this morning of paying three hundred dollars blood money, as my friend, Bennett, calls it. Was that W. J. Mills you paid that to?

A. No, sir.
Q. You say you do not now remember his name?
A. No, sir.

The COURT to the witness:

Q. Do I understand you to say this money was paid out by the company?
A. Yes, sir.
Q. And you don't know who he is?
A. I don't recollect his name.

Mr. KIMBALL to the witness:

Q. Not an agent of this company?
A. An agent of the railroad company.

The COURT to the witness:

Q. Did you ever report that payment to the company?
A. Yes, sir.
180 Q. To whom?
A. To the secretary.
Q. And to whom it was paid?
A. Yes, sir.
Q. And the fact that you had paid the money?
A. Yes, sir.
Q. And that you held a claim against the company for it?
A. Yes, sir.

Recross-examination.

Examined by Mr. BENNET:

Q. Who do you think the man was? Would you know him if you saw him?
A. I don't know.
Q. Is he in the court-room?
A. I don't know.
Q. He was in this morning, wasn't he?
A. No, sir.
Q. What is his name, do you think, according to your best recollection?
A. Well, if you know a man that used to run a newspayer at Reno, that's the man.
Q. You can't call him by name?
A. I can find out his name.
Q. Have you any idea about his name?
A. No, sir; I couldn't call his name to save my life.
Q. You say you reported that payment to Mr. Fowler?
A. Yes, sir.
181 Q. When?
A. About the same time it was paid.
Q. What did you pay the money for?
A. To help the contract through, buying the C. P. land. I

made him a proposition; I told him that if he would get the proposition accepted in behalf of our company I'd pay him so much money. That is all there was to it.

Q. Where did you pay him the money?

A. Right in Corinne.

Q. He was there?

A. Yes, sir.

Q. Did you ask him to go there to meet *bou*?

A. No, sir; he was sent there. I had been corresponding with the railroad about it.

Q. Who did you correspond with?

A. With Mr. Mills.

Q. Did he come with credentials from the company?

A. Yes, sir.

Q. Was there anything in the way of getting the contract?

A. I didn't find much difficulty; we got the land.

Q. Why did you pay this man the money?

A. Well, because I wanted him to recommend the sale of the land.

Q. Did you take him over the land and show it to him?

A. I think the correspondence was in the hands of the secretary.

182 Q. Now, all there was of it, this man, as agent for the Central Pacific Company, went over the land with you?

A. Yes, sir.

Q. I don't yet see why he should be paid three hundred dollars?

A. Maybe you don't.

Q. Well, if there is any reason for not explaining it, Mr. Toponce, you might say so. In the meantime say to the jury if you did get a part of it?

A. You might just as well tell me to tell them the other man got it. You would come as near to it as any way.

Q. You paid him that money for what consideration?

A. For him to work the contract through.

Q. You knew the company had the land for sale?

A. Yes, sir; and he was there to report on the land.

Q. Was there a grade at that time?

A. No, sir; not at that time.

Q. What was the point, then, to get a grading at the price you were willing to give?

A. Yes, it was to buy the land at the price I was willing to give, or the company was willing to give. I didn't buy it for myself I bought it for the company.

Q. So this man came to you with a commission from Mills?

A. Yes; he came with a letter from Mr. Mills.

183 Q. For the express purpose of negotiation with the Corinne Company concerning the sale of these lands?

A. That was what he was sent for.

Q. Did he manifest any disposition not to sell—not to report to the company?

A. A disposition to keep the land worth more money than I wanted to give for it.

Q. What was your purpose, now, in paying this money?

A. Making him report favorable.

Q. That is, it was, as I said this morning, blood money?

A. That's it.

Q. You had no authority on the part of this company, or as manager, to buy up the agents of the C. P. road, had you?

A. I don't know whether I had or not. I rather believe I had, if I could make a good contract, if he's a commodity in the market.

Q. Do you mean to say you had any commission from the company to do that thing?

A. There was none of the company there but Mr. Fowler and myself. Mr. Fowler and myself negotiated it.

Q. Did Mr. Fowler know about your design to buy this agent before it was done?

A. I think he did.

Q. I want to know positively.

184 A. I know he did.

Q. Before the agent came?

A. No, sir.

Q. While the agent was here?

A. While the agent was here.

Q. Where did you communicate that fact to him?

A. It might have been in the office and it might have been on the street.

Q. It might have been anywhere on the continent; where was it?

A. The proposition was made at Corinne; it was afterwards ratified at Salt Lake.

Q. Where did you have the talk with Mr. Fowler with regard to the purchase of this agent's discretion?

A. I could not say the exact spot.

Q. Who was present beside you and Fowler?

A. I don't think there was any one.

Q. Do you know whether there was any one or not?

A. I know there was none.

Q. Where was the agent when you had the talk with Fowler?

A. Around town.

Q. Had you made the proposition to him before?

A. Yes, sir.

Q. Then you went to the office and notified Mr. Fowler?

A. I talked to Mr. Fowler about it.

Q. Did you call a meeting of the board of directors to pass upon that matter?

185 A. No, sir; I told Mr. Fowler, the secretary of the company, to write out the proposition, which he did. I made the arrangement with the party and told him if the proposition went he could have so much; that was all there was to it.

Q. Mr. Fowler then simply wrote the proposition?

A. He wrote it, yes, sir.

Q. And you took it to the agent in writing?

A. He was right there.
Q. The same day?
A. I don't know whether it was the same day or not; I think he was there a day or two; we went over a portion of the land.
Q. When was that?
A. That was in the spring of '83.
Q. What month?
A. I think it was in April.
Q. Can you be sure?
A. I think it was in April, to the best of my recollections. I think the contract was finished on the 2d of April or May. I can't be positive which.
Q. It was in the spring of the year?
A. It was before the president of the company got back from Wyoming.
Q. Did you consider that part of your traveling expenses?
A. I don't know whether you would call it traveling expenses; it is expenses.

JOHN FREE, called for the plaintiff, being first duly sworn, testified as follows:

186 Examined by Mr. KIMBALL:

Q. Where do you live?
A. Salt Lake City.
Q. How long have you lived there?
A. Since '79.
Q. Do you know of the Corinne Mill, Canal & Stock Company?
A. Yes, sir.
Q. How long have you known of the company?
A. The last six or eight years.
Q. Did you ever do any business in connection with it?
A. Yes, sir.
Q. When and what was the character of the business?
A. In '84 I was agent for the Central Pacific in looking up land, and I had occasion to look after some interest for Mr. Kerr and Toponce in the matter, and furthermore I had occasion once or twice to look up some sales.
Q. What land?
A. The company's land.
Q. The Corinne Mill, Canal & Stock Company's land?
A. Yes, sir.
Q. In the course of that business had you occasion to communicate with Mr. Kerr?
A. Yes, sir.
Q. What position, if any, was he occupying with the Corinne Company at that time?
187 A. He was president the way I understood it.
Q. You had a talk with him with regard to the company's business?
A. Yes, sir.

Q. Also with Toponce?
A. Yes, sir.
Q. I'll ask you to state what, if anything, Mr. Kerr said about Mr. Toponce having charge of the land?

Mr. BENNETT: I object, as incompetent to bind the company.
Mr. KIMBALL: I offer this to show notice to the president of the company and one of the directors.
The COURT: The organization is not proven by the by-laws, if they had any.
Mr. KIMBALL: The organization is admitted, whether governed by by-laws and rules is not shown.
Mr. BENNETT: They are governed by by-laws and rules.
The COURT: You may take the testimony.
Mr. BENNETT: Note an exception.

A. I asked Mr. Kerr to give me an option on the land. He agreed to upon certain terms, and I wanted to go away on that day, and I asked him if he couldn't finish it up and he remarked that as far as he was concerned he could, but he could not do it till he see Mr. Toponce because he was interested in the matter.
Q. What, if anything, did he say as to Toponce having charge of the land?

188 Mr. BENNETT: I object as immaterial and incompetent.
The COURT: That is all right.
Exception.

A. Well, he said Mr. Toponce was interested, and he couldn't do anything without consulting him in the matter.
Q. What time was it you had this conversation with Mr. Kerr?
A. I couldn't tell you the exact time because I dismissed it from my memory.
Q. What year was it?
A. '85 I think.
Q. And where was it?
A. In Corinne.
Q. Whereabouts in Corinne?
A. It was in Mr. Kerr's house where he was living.
Q. Did you see Mr. Kerr on more than one occasion with reference to the business of the company?
A. Twice.
Q. Both in the same year?
A. No, sir.
Q. When was the other?
A. One was in '84 and the other was in '85.
Q. In '84 what was the character of the business?
A. I was trying to sell the land.
Q. For whom?
A. For the company.
Q. Did you see Mr. Toponce upon that occasion?
189 A. Yes, sir.
Q. And Mr. Kerr also?

A. Yes, sir.
Q. Whereabout did you see them?
A. In Corinne.
Q. Both together, were they?
A. Yes, sir.
Q. In '84, at that time, what, if anything, was said about Mr. Toponce having charge of the land?

Mr. BENNETT: I object on the same grounds—incompetent to bind the company, immaterial to the issue.
The COURT: It may be received.
Mr. BENNETT: Note an exception.

A. There was nothing talked only about the transaction for the present right.

The COURT, to the witness:

Q. There was nothing said on the subject he asked you about?
A. No, sir.

Cross-examination waived.

Redirect examination.

Examined by Mr. KIMBALL:

Q. Did you go to examine the land during the time you were taking these options, or trying to get them?
A. Yes, sir.
Q. Did any persons go with you?
190 A. Well, not at this particular time they didn't. I went over the land several time- with parties looking at it.
Q. Who, if any person, went with you for the company?

Mr. BENNETT: I object, as utterly immaterial.
The COURT: What is the object?
Mr. KIMBALL: I want to show that Mr. Toponce went with him and showed him the land.
Mr. BENNETT: Still immaterial.
Mr. ROGERS: It shows services.
The COURT: It tends to show the fact that he rendered services. For the purpose of proving the mere fact that he was around there taking some charge of the property. You may take the testimony.
Mr. BENNETT: Exception.
WITNESS: Yes, sir; Mr. Toponce went along, and Mr. Tarpey, and Mr. Philips.

Q. Who were the parties seeking to purchase the land at that time?

Mr. BENNETT: Utterly immaterial.
The COURT: What is the purpose of that?
Mr. KIMBALL: I expect to show these parties were negotiating for the land and that Toponce showed them over.

The COURT: I don't see that who the persons are is material. The objection may be sustained.

Recross-examination waived.

191 Mr. KIMBALL: I now offer in evidence the complaint in case No. 548—The Corinne Mill, Canal & Stock Company *vs.* William Johnston.

The COURT: For what purpose?

Mr. KIMBALL: I offer it for the purpose of showing it was a suit brought by the company in this court, and I intend to offer in evidence, following it up by the various cost bills claimed to have been paid by Toponce.

Mr. BENNETT: I object, as immaterial.

The COURT: They may be received for that purpose.

Mr. BENNETT: Note an exception.

Mr. KIMBALL: This complaint is against William Johnston *vs.* The Corinne Mill, Canal & Stock Co., and seeks to replevy some 1,779 head of sheep alleged to be the property of the company and alleged to have been wrongfully taken by William Johnston, and was verified in this court upon the 30th day of June, 1884, by A. C. Emerson, clerk, by J. K. Fowler, secretary of the company.

I offer in evidence the answer in that same case, No. 548, for the purpose of showing the appearance of the defendant and the pendency of the suit.

I offer in evidence the undertaking and affidavit on claim and delivery in the same case. The undertaking bears date 30th of June, 1884, and is executed on the part of the company by John W. Kerr and H. H. House. The affidavit on claim and delivery is verified by J. K. Fowler, secretary.

192 I offer in evidence the undertaking also to show that Mr. Kerr was informed of the bringing of the suit in the company's name, and the president and the secretary represented the company.

I offer in evidence a cost bill in the same case, No. 548, filed March 12, '84, in this court for $156.50 paid out for the defendant.

Mr. BENNETT: I object, as immaterial.

The COURT: They may be received for that purpose.

Exception.

I offer in evidence another cost bill in the same case, filed May 12, 1887, for $172.85.

Mr. BENNETT: Same objection.

The COURT: Same ruling.

Mr. BENNETT: Note an exception.

Mr. KIMBALL: I now offer in evidence another one in the same case filed December 4, 1884, for $86.50.

I now offer in evidence the complaints in case No. 552, entitled, Corinne Mill, Canal & Stock Co. *vs.* Paul and Martin Stark, which is a complaint for trespass, and verified by J. K. Fowler, secretary of plaintiff.

Mr. BENNETT: Same objection—immaterial and incompetent.

The COURT: Same ruling.

Mr. BENNETT: Exception.

Mr. KIMBALL: I offer in evidence the answer in the same case to show it was an issue and pendin*d* in this court.

193 I now offer in evidence cost bill in the same case, No. 552, filed in this court May 28, 1886, for $28.70.

Mr. BENNETT: Same objection.

The COURT: Same ruling.

Mr. BENNETT: Exception.

Mr. KIMBALL: I offer in evidence complaint in case No. 551—Corinne Mill, Canal & Stock Co. *vs.* Abraham Hunsucker, and filed in this court July 4, 1884, and verified by J. K. Fowler, secretary of the company.

Mr. BENNETT: Same objection.

The COURT: Same ruling.

Mr. BENNETT: Exception.

Mr. KIMBALL: I offer that for the purpose — the knowledge of this company of the pendency of this suit.

The COURT: It may be received.

Mr. KIMBALL: Case No. 558, Corinne Mill, Canal & Stock Co. *vs.* Albert Nichols, I offer in evidence the compl*ff*int, with verification by J. K. Fowler, secretary, for the purpose of showing a knowledge of the pendency of these suits in the company.

Mr. BENNETT: Same objection.

The COURT: Same ruling.

Mr. BENNETT: Exception.

Mr. KIMBALL: I offer in evidence complaint in No. 556, Corinne Mill, Canal & Stock Co. *vs.* William Johnston. That is an appeal case and also the cost bill in this case against the plaintiff for $19.70.

194 In case No. 670—Corinne Mill, Canal & Stock Co. *vs.* William Johnston, I offer in evidence the complaint, verified by J. K. Fowler, secretary, and the answer of the defendant, for the purpose of showing the pendency of the suit and the cost bill in that case in favor of the defendant for $48.95.

I offer in evidence complaint in case of The Corinne Mill, Canal & Stock Co. *vs.* William Johnston, No. 646, with the answer of the defendant in this case and the writ of attachment also, and the return and also the cost bill in that case for $129.30 against the plaintiff.

I offer in evidence complaint and answer in No. 865—Corinne Mill, Canal & Stock Co. *vs.* William Johnson, with the cost bill in that case. The cost bill in this case is $122.50 in favor of the defendant.

The COURT: Those papers may all be received and an exception entered in favor of the defense.

GEORGE J. MARSH, called by the plaintiff, being first duly sworn testified as follows:

Examined by Mr. KIMBALL:

Q. Mr. Marsh, you are attorney for William Johnston and for Stark in the various cases which I have offered in evidence here?

A. Yes, sir.

Q. You heard me state the amount of those various cost bills, did you?

A. Yes, sir.

Q. State whether or not you, as attorney for these parties, receive pay for those cost bills?

A. I received the pay for all the cost bills that were paid, I believe.

195 Q. I ask you about those various cases?

A. My recollection now is that there is $172 paid by Mr. Bennett. I don't recollect the cost bills before that.

Q. Didn't pay you costs in No. 548 three different times?

A. That is the sheep case you mean?

Q. Yes.

A. It is a long time ago. I ain't positive about that. I could tell in reference to my account. It's been a long time since that occurred.

Q. Well, will you refer to your account, and tell us?

A. I can tell you when I go home.

Q. Well, the cost bill of $166.60; who paid that?

A. Well, I know it has been paid. I'll have to refresh my recollection.

The COURT: Wouldn't it be best to let Mr. March look over his accounts and then tell you?

Mr. KIMBALL: Look over your account for each of those cases.

Mr. MARCH: Didn't I receipt to you?

Mr. KIMBALL: I think you receipted the record.

Q. You made a memorandum of it at the time?

A. Yes, sir; I made a memorandum of all that I received.

SIMON MCKENZIE, called for the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. KIMBALL:

196 Q. Where did you live in '85 and '86?

A. Paradise.

Q. What business were you engaged in?

A. Sheep-herding.

Q. Were you so engaged in '86 and '87?

A. Yes, sir.

Q. How many sheep had you under your management at that time?

A. Well, I had all the way from 7,000 to 8,000, just as the case might be.

Q. You were engaged in that business of stock raising?

A. Yes, sir.

Q. Do you know of the Corinne Mill, Canal & Stock Co. and did you know of it during the years '85–'6–'7?

A. Yes, sir.

Q. During that time did you have any business transactions with that company?

A. Yes, sir.

Q. What was the nature of them?

A. I rented land in the spring, for a spring range for the sheep.

Q. Any other?

A. I bought bucks from them in the fall again.

Q. With whom, on the part of the company, did you transact that business?

A. Alexander Toponce.

Q. What part of the business did he represent?

197 A. He transacted the business with me. He sold me the bucks and he rented the land to me.

Q. Well, you paid for those bucks, subsequently?

A. Yes, sir.

Q. To whom did you make payment?

A. I made payment to the clerk.

Q. Who was that?

A. This gentleman here.

Q. What is his name?

A. Fowler. I made one payment to Alexander Toponce.

Q. One to Mr. Toponce and one to Mr. Fowler?

A. Yes, sir.

Q. With reference to the sheep and land transactions, to whom did you make payments?

A. Mr. Fowler.

Q. Did you have land from them more than one year?

A. For three years.

Q. Each year did you make a new arrangement, or was the first arrangement for the whole three years?

A. There was a new arrangement each year.

Q. With whom did you make that, on the part of the company?

A. Mr. Toponce.

Q. And the money was paid to Mr. Fowler each year, was it?

A. Yes, sir; I went to the office.

Q. I'll ask you another thing: Were you upon their

198 ranch a good deal of the time during those three years?

A. Yes, sir; I was always there, mostly in March and most of April and September and October, and through the spring and fall of the years.

Q. What was Mr. Toponce doing those times, if you know?

A. Well, I—he was always——

Mr. BENNETT: I object; that is immaterial.

The COURT: I suppose that is for the purpose of showing the fact.

Mr. BENNETT: Exception.

Mr. KIMBALL, to the witness:

Q. State what he was doing.

A. Well, he was always driving about between the ranch and

Corinne, always on business and seeing there was no one upon the ranch there but who was paying for it. I could always see him going about, but it was none of my business to ask him what he was after.

Q. I'll ask you to state if there was a great many stock on that ranch, if you know, beside your own?

A. Lots of stock, sheep and cattle and horses.

Q. Do you know whether or not Mr. Toponce was looking after that stock?

Mr. BENNETT: Same objection.

The COURT: Same ruling.

Mr. BENNETT: Exception.

199 A. He was the only man we ever looked to, to do business there that ever I did with, or any other man that was there; they always looked to Mr. Toponce to transact business with.

Q. How long have you been engaged in the ranching business?

A. Seven years in this country.

Q. Can you state what Mr. Toponce's services would be reasonably worth, per month, during the time he was engaged in the character of business you say?

Mr. BENNETT: I object; no foundation laid for it.

The COURT: I am inclined to think that is so, Mr. Kimball.

Mr. KIMBALL: He says he knows the character of service he was rendering.

Mr. KIMBALL, to the witness:

Q. Do you know what would be the reasonabel value of the services rendered by Mr. Toponce? You can answer that yes or no, whether you know or not.

A. Yes. I saw him going about.

Q. I asked if you were able to tell?

A. Yes, sir.

Q. Now, then, you may state what you think his services were reasonably worth?

A. They wouldn't be worth less than $400 a month, I should think.

Cross-examination.

Examined by Mr. BENNETT:

Q. Where did you do your ranching business before you came here?

200 A. In Scotland.

Q. In the Highlands or the Lowlands?

A. In the Lowlands.

Q. Where in the Lowlands?

A. Aberdeen.

Q. Did you ever hear of a herder getting four hundred dollars a month?

A. I didn't consider him a herder.
Q. Foreman?
A. He was more than a foreman. He was a-managing of all the business.
Q. How do you know?
A. Because we always looked to him and he always transacted our business with us.
Q. He acted so?
A. Yes.
Q. Well, in your experience in herding sheep in the Highlands and in the Lowlands, what would a man be entitled to for that service?

Mr. KIMBALL: I submit that what he would get in the Highlands and in the Lowlands is immaterial.
The COURT: He may ask him that.

A. I got more than four hundred dollars a month in the old country for business.
Q. What sort of business?
A. In sheep and cattle business.
Q. On how many ranges?
A. There was no ranges—it was handling stock.
Q. How many did you handle in a day?
201 A. Handle a hundred, and the next day none at all.
Q. How many head had you under your charge?
A. I couldn't tell you that; I transacted the business.
Q. How many cattle had you under your charge?
A. One day possibly ten thousand, and the next day none at all. We turned them over there and done business.
Q. It amounted to quite a little bit of money, didn't it?
A. Yes, sir.

CARL C. LOVELAND, called for the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. KIMBALL:

Q. Your name is Carl C. Loveland?
A. Yes, sir.
Q. What business were you engaged in in '85?
A. I was sheriff of Box Elder county.
Q. You are the sheriff that served the writ of attachment in case No. 646 from this court, are you?
A. Yes, sir.
Q. Upon what property did you levy?
A. Some horses.

Mr. BENNETT: I object, as immaterial.
Mr. KIMBALL: I'm laying the foundation; I expect to prove this bill by him.
Mr. BENNETT: I object to the foundation.
The COURT: It may be received.
202 Mr. BENNETT: Note an exception.

Mr. KIMBALL, to the witness:

Q. How many head of horses did you have?
A. Well, I don't remember, but I think it was between fifty and sixty.
Q. How long did you keep the horses under your charge?
A. I think it was a little over a year.
Q. Do you remember the amount of costs you collected for keeping those horses under that writ?
A. Well, not exactly. It was nine hundred and some odd dollars.
Q. Who paid your bill?
A. Well, Mr. Toponce, most of it.
Q. Do you remember how much he paid you?
A. No, sir, I do not, exactly.
Q. That is your signature to that account, is it?
A. Yes, sir.
Q. You rendered that account to Mr. Toponce, did you?
A. Yes, sir.
Q. And the money was paid according to that receipt, was it?
A. Yes, sir.
Q. That was for keeping the horses that you had under your charge, as sheriff, on a writ of attachment?
A. Yes, sir.
Q. State whether or not that was a reasonable sum for the services rendered by you.
203 A. Yes, sir; I considered it very reasonable.

Cross-examination waived.

J. K. FOWLER, called for the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. KIMBALL:

Q. Mr. Fowler, you are the secretary of the Corinne Mill, Canal & Stock Co., are you?
A. Yes, sir.
Q. You were such in '87?
A. Yes, sir.
Q. Do you remember the case of The Corinne Mill, Canal & Stock Company *vs.* Johnston, that was tried before Justice Church?
A. Yes, sir, I do.
Q. Do you know who received the money on the judgment on the case?
A. On my own knowledge I do not; I have inquired, however.
Q. I will ask you to examine that document and say in whose handwriting it is in.
A. That is in mine.
Q. That is an order on the justice of the peace to pay a portion of that judgment for the company, isn't it?
A. Yes, sir.
Q. Do you know whether it was paid on that order or not?

A. I think it was, for the reason that Mr. Cox, I understood, purchased one of the animals.

204 Q. Who was Mr. Cox?

A. Mr. Toponce and him made the settlement.

Q. Who was Mr. Cox?

A. He was a gentleman who had worked on the ditch, I think.

Q. Well, employed by whom?

A. Employed by the company, I think, on the ditch; I won't be certain.

Q. But that account was due him?

A. Yes.

Q. The order was to pay his wages?

A. Yes, sir; that account was due him.

Q. Out of the money on the Allen judgement in favor of the company?

A. Yes, sir; I requested the justice to pay that.

Cross-examination waived.

Mr. KIMBALL: I now offer this receipt in evidence.

The COURT: It may be received.

Marked Plaintiff's Ex. P, P. E. K.

W. H. BOOTH, called for the plaintiff, being duly sworn, testified as follows:

Examined by Mr. KIMBALL:

Q. Where do you live?

A. I live at Brigham City.

Q. How long have you lived at Brigham City?

A. Twenty-five years.

Q. What business were you engaged in from '83 to '87?

A. Stock business.

205 Q. In what kind of stock business?

A. Mostly cattle and horses.

Q. I will ask you to state whether you are engaged in the ranch business.

A. Yes, sir.

Q. Whereabouts?

A. Near Corinne, and also near Collinston.

Q. How far is Corinne from Brigham City?

A. Six miles.

Q. Did you know the Corinne Mill, Canal & Stock Co. from January, '83, to December, '87?

A. Yes, sir.

Q. Did you have any business transactions with the company during that time?

A. Yes, sir.

Q. What was their character?

A. I got them to ranch some stock for me.

Q. Who, on the part of the company, transacted that business with you?

A. Well, my business was done by Mr. Toponce.

Q. Were you pretty well acquainted with the location of the ranch of the Corinne Mill, Canal & Stock Co.?

A. Yes, sir.

Q. Do you know the character of the business which they were doing during those years?

A. I don't know all of it. I know I've seen their ranches and a great many stock on the ranch.

206 Q. Acquainted with Mr. Toponce during that time?

A. Yes, sir.

Q. Do you know what he was doing during that time?

A. Well, he acted as foreman altogether when I was around.

Q. Foreman of the Corinne Mill, Canal & Stock Co.?

A. Yes, sir.

Q. Did you have more than one business transaction during that time?

A. I disremember having more than one.

Q. I'll ask you to state whether you were frequently on that ranch.

A. Yes, sir; I was there often, receiving cattle.

Q. How many cattle did you have there?

A. I had upward to a hundred head of steers there.

Q. Do you know what the reasonable value of a foreman or manager's service would be for that company, during that time; you can answer that question, yes or no.

A. Well, I should say no; I don't know.

Cross-examination waived.

A. J. SHUPE, called for the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. KIMBALL:

Q. Where do you live?

207 A. Ogden City.

Q. What business were you engaged in during '84 and 85?

A. I was tending to some stock for Mr. Kuhn.

Q. What has been your business for the last few years?

A. I've been employed for Mr. Kahn—in his employment.

Q. In what capacity?

A. Well, I've been working; traveling for him, buying up stuff, one thing or another; then I was up there working for him to Corinne.

Q. When was it you was at Corinne for him?

A. In '84 and '85; then I was there off and on for the past two or three weeks.

Q. Whereabouts did he keep his sto-k?

A. He kept it right up there on Mr. Toponce's ranch.

Q. That was in '84 and '85?

A. Yes, sir.

Q. Do you know what business Mr. Toponce was engaged in at that time?

A. He was manager for the Corinne Mill, Canal & Stock Co.
Q. Was there other stock on the ranch during the time you was there for Mr. Kuhn?

Mr. BENNETT: I move to strike out that last answer; it is a conclusion.
The COURT: It is in the nature of a conclusion; it may be stricken out.

208 Mr. KIMBALL, to the witness:

Q. What was Mr. Toponce's business there?
A. Tending to the stock, taking horses and cattle to ranch, and tending to the business there.
Q. That's during the time you were there?
A. Yes, sir.
Q. How much stock did Mr. Kuhn have on there?
A. He had about forty or fifty head of horses.
Q. There was other stock on the ranch at the same time?
A. Yes, sir.
Q. About how much, if you know?
A. Well, there was five or six hundred head of beef steers there when I was there. There was other cattle—ranch cattle. I don't know the exact number, but then I heard them state the number and I saw their cattle.

The COURT: That may be stricken out.

Q. You saw Mr. Toponce about the ranch, did you?
A. Yes, sir.
Q. What was he doing there?
A. He was tending to the business.
Q. Who made the arrangement with the company about Kuhn's stock?
A. He made the arrangement; Mr. Kuhn made the arrangement.
Q. Were you there at that time?
A. Yes, sir.
209 Q. With whom did he transact the business?
A. With Mr. Toponce.
Q. During these two years?
A. Yes, sir.
Q. During the time that Mr. Toponce was there, are you able to state what his services were reasonably worth per month? You can answer that yes or no.
A. Yes, sir; from my knowledge.
Q. You are able to state?
A. Yes, sir.
Q. State what his services would be reasonably worth.
A. I should think the reasonable wages would be about $300 a month, for what he had to do and what he did do.

Cross-examination.

Examined by Mr. BENNETT:

Q. Do you know wages as they run in Box Elder county for that sort of business?
A. Well, I've seen different parties do such things.
Q. Where?
A. In that county—what men has been getting.
Q. Who?
A. Well, I don't know exactly as I can tell you the parties now. There is one man, if I could think of his name. No, he don't live in Box Elder county; he lives just over the divide from Hampton.
Q. Where is he employed—on what ranch—for what person is he employed?
210 A. That's what I was trying to think. I can't think of his name. He's on a ranch over there the other side of the divide. On a large ranch.
Q. Do you know the duties he performs on that ranch?
A. Yes.
Q. What are they?
A. Tends to the stock and sees to 'em, and tends to the business for the company.
Q. You don't know what he gets for a salary, do you?
A. Well, I don't know what he gets only from what folks told me. I have never seen him paid off.
Q. Coming back to the question now, do you know the ruling price for salary in Box Elder county for services such as Mr. Toponce did for the Corinne Mill, Canal & Stock Co.?
A. Well, I know only from what parties have told me others have been getting.

Redirect examination.

Examined by Mr. KIMBALL:

Q. There was one question I omitted to ask. Did you ever transact any kind of business with the company?
A. Yes, sir.
Q. When?
A. In '85.
Q. State what it was.
211 A. Well, I bought a lot of sheep pelts from Mr. Toponce.
Q. Who did you first go to in reference to that?
A. Mr. Kerr.
Q. Where?
A. In Corinne.
Q. What did he have to say about it?

Mr. BENNETT: I object to what Mr. Kerr said to him.
The COURT: That may be admitted.
Mr. BENNETT: Exception.

Mr. KIMBALL, to the witness:

Q. Well, you went to him; what did he say?
A. Mr. Kerr told me to go to Mr. Toponce. he was managing the business.
Q. When was that?
A. In '85.
Q. Then, afterwards you bought the pelts of Mr. Toponce?
A. I bought them and gave a draft for them.

Recross-examination.

Examined by Mr. BENNETT:

Q. What is your business?
A. My business is working for Mr. Kuhn Brothers.
Q. In what line of business?
A. In dry goods and in hides and furs.
Q. Engaged in ranching?
212 A. Yes, sir; I was engaged in doing a little of everything for Mr. Kuhn that you can mention, and pretty near that a man can do.
Q. You never was a foreman on a ranch, was you?
A. No, sir; I have worked for Mr. Kuhn, doing what had to be done there.
Q. And seeing what was done—simply in the emply of Kuhn Brothers as a hired man?
A. Yes, sir; simply in his employ, doing whatever had to be done.
Q. What do you get for your services as jack of all trades?

Mr. KIMBALL: I object. Immaterial.
The COURT: Well, he has been here as a judge of people's services, and what they were worth. I think that might be proper. It may be admitted.
Mr. KIMBALL: We except to the ruling of the court.

A. Well, it's hard for me to tell what I do get. He gives me so much money and a percentage on what I bought and sold.
Q. Well, you know pretty near what it amounts to?
A. It's never been figured up.
Q. What do you get per month?
A. $60.00 a month.

Redirect examination.

Examined by Mr. KIMBALL.

213 Q. You get a commission for what you buy and sell?
A. Yes, sir.

HENRY H. HOUSE, called for the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. KIMBALL:

—. Where do you live?
A. I am living at Point Lookout now?

Q. Where did you live in 1883?
A. I lived in Corinne.
Q. I will ask you if you ever worked for the Corinne Mill, Canal & Stock Co.
A. Yes, sir.
Q. When did you work for that company?
A. I worked for them at different times in 1883.
Q. When did you first work for them?
A. The first work I done for them was putting up hay.
Q. When was it?
A. In '83, I think.
Q. By whom were you employed on account of the company?
A. I made a contract with Mr. Toponce.
Q. How did you come to make the contract with him?
A. Well, he come to me and wanted to know what I would put up hay for by the ton.
Q. Who, if any person, had the supervision of putting up that hay?
214 A. He had, I think.
Q. Well, you say you think; were you there?
A. Well, he's the man I made the contract with.
Q. Who had charge of the men putting up the hay?
A. I hired the men and put up the hay for so much a ton.
Q. By whom were you paid, if by any person?
A. I was paid by the Corinne Mill, Canal & Stock Co.
Q. By what person of that company?
A. Mr. Kerr is the man. Mr. Toponce ordered it paid and Mr. Kerr signed the check for me. Part of it was paid in goods out of the store.
Q. Who was in charge of the store?
A. Mr. Fowler was in charge of the store at that time.
Q. This Mr. Fowler here?
A. Yes, sir.
Q. You worked for the same company afterward?
A. Yes, sir.
Q. Upon whose employment?
A. Upon the employment of the Corinne Mill, Canal & Stock Co.
Q. Who did you make the arrangement with, if any person?
A. I made the contract with Mr. Toponce.
Q. Where was Mr. Kerr during that time?
A. Well, he was in Corinne a part of the time.
215 Q. What, if anything, did he know about your working for the company?
A. Well, he knew I was building fence for them. He acknowledged that it was all right.
Q. You talked with him about that?
A. I don't recollect that I ever said anything. I remember, at one time, he told Mr. Fowler not to let me have any goods until the contract was completed.
Q. Did he know whom you made the contract with?
A. Yes, sir.

Cross-examination waived.

JAMES HAMMOND, called for the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. KIMBALL:

Q. Mr. Hammond, where do you live?
A. About three miles and a half south of here, at Riverdale.
Q. What business were you engaged in from January 1, 1883, to December 1, 1887?
A. Most of the time I was in the sheep business.
Q. How many sheep did you have under your control?
A. From 25,000 to 30,000.
Q. During the time I mentioned were you acquainted with Mr. Toponce?
A. Yes, sir; more or less.
Q. And with the Corinne Mill, Canal & Stock Co.?
216 A. To some extent.
Q. Did you have any business with the company during any of that time?
A. Yes, sir; we had some sheep on their ranch.
Q. How many?
A. Well, the first sheep we had there, we had about five thousand.
Q. When was that?
A. That was three years ago this spring.
Q. Did you have others there before and after that?
Q. I think those were the first sheep we had there.
Q. How many since then?
A. One time, I believe, there was five or six thousand head; and, then, two years ago this month we had six hundred and nine bucks with Mr. Toponce on the ranch.
Q. Well, you hired a ranch of them?
—. ——.
Q. With whom did you transact the business on the part of the company?
A. The first sheep we had there Mr. Peterson made the arrangement with Mr. Toponce.
Q. Was you there at that time?
A. No, sir.

Mr. BENNETT: I move that be stricken out.
The COURT: That may be stricken out.

Q. Did you make any arrangement yourself?
A. Yes.
Q. With whom did you transact the business?
217 A. With Mr. Toponce.
Q. Whom did you pay for the ranch, if any person?
A. I paid the Corinne Mill, Canal & Stock Co. I paid them $100.00. There was a little dispute about the bill?
Q. To what person did you make payment?
A. Mr. Fowler.

Q. That was on the contract you had formerly made with Mr. Toponce?

A. Yes, sir.

Q. Were you over the ranch of the Corinne Mill, Canal & Stock Co. during '83—I mean from '83 to '87?

A. Well, I've been there more or less every year, traveling through by the road.

Q. Do you know what Mr. Toponce was doing during that time?

A. Well, he seemed to be managing the business.

Q. Well, what did he do?

A. He was working around generally—rustling around. He seemed to have charge of it.

Q. How long have — been engaged in the stock business?

A. I guess it must be ten years since we bought the first sheep we ever had. Nine or ten years.

Q. You have been engaged in that business ever since?

A. Yes, sir.

218 Q. Do you know what would be the reasonable value of the work he did there, per month?

A. Well, that's a kind of a hard question to get at.

Q. Can you tell from your experience and knowledge what it ought to be worth?

A. At least $390 a month.

Mr. BENNETT: I move to strike that out.

Mr. KIMBALL to the witness:

Q. Have you ever been engaged in the ranching business yourself?

A. Yes, sir.

Q. In what capacity?

A. I used to be foreman for Sparks & Tinnin.

Q. What character of business was it compared to what Mr. Toponce was doing?

A. Driving cattle.

Q. Same nature of work?

A. No, sir; I was under two or three other bosses.

Q. Well, now, I ask you if you can answer that question, yes or no, whether you know what it would be reasonably worth to render those services?

A. I think it would be worth $300 a month.

Q. Can you answer that question yes or no, whether you are able to state what it would be worth?

A. I think I am.

Q. You may state.

A. I think it would be worth about $300.00 a month.

Cross-examination.

Examined by Mr. BENNETT:

219 Q. Where did you obtain the knowledge from which to state that it would be worth?

A. From what I was getting.
Q. As foreman?
A. Yes, sir.
Q. When and where?
A. Well, I acted as foreman for Sparks & Tinnin, and then I didn't run the whole business.
Q. Are you now foreman for any company or firm?
A. Well, I'm supposed to be in charge of the outfit.
Q. Well, what do you get?
A. There's three of us; we don't draw any salary at all.
Q. Do you know of any foreman in Box Elder county who receives a salary as foreman?
A. Well, no, I'd have to go out of Box Elder county.
Q. Where do you know of a man?
A. I know a general superintendent over here in Idaho.
Q. What is his name?
A. Mr. Regan. He's superintendent of the War Bonnet Co.
Q. Used to be at Laramie?
A. Yes, sir.
Q. Owner, isn't he, in the affair?
A. Yes, sir. And then he's superintendent over the company.
220 Q. Is that the only one you know of?
A. Well, I know of another one out West here, Sparks & Tinnin's foreman.
Q. Where is he employed?
A. Part of the time in Utah and part of the time in Idaho. The headquarters of the ranch is in Nevada.
Q. You know nothing about what Toponce's duties were except what you saw during the times you were at the ranch?
A. What I saw when I was at the ranch.
Q. How many cattle, horses and sheep had he in charge at the time you were there and saw him?
A. That's a question I couldn't answer.
Q. It would have some bearing on the salary, wouldn't it?
A. Well, one thing I should judge about the salary—a man is in charge of the property. I heard him claim he was in charge of five or six hundred thousand dollars' worth of property.
Q. What property did he have charge of, to your knowledge?
A. Well, he had charge of the land.
Q. Not what he said, or what anybody else said.
A. To my knowledge I know he had charge of the stock.
Q. How many sheep, horses and cattle did he have charge of?
A. That's a question I can't answer. There was two or three herds of sheep, more or less.
221 Q. You're not able to state how many?
A. No, sir.
Q. When did Mr. Toponce first ask you to become a witness here?
A. I don't just exactly remember—here a short time ago. I was going away and he told me he wanted me as a witness.

Q. Did he ask you about salary?
A. I don't think he did at that time.
Q. Your only knowledge is from what you saw around the ranch?
A. Yes, sir.
Q. He never told you what he was doing?
A. Well, yes; I was at the ranch two or three years ago this spring. I was there probably fifteen days. Mr. Toponce and I were together some, and I saw what he was doing.
Q. You saw what he was doing?
A. Yes, sir Superintending the business.
Q. Did he at that time, or has he since, told you what labor he had performed for the company?
A. I don't think that he did.
Q. So you base your judgment upon what he gets, and your knowledge of what Toponce did from your own observation?
A. Yes, and what I should judge a man to take charge of that property would be worth. I've heard him claim what it was worth.
Mr. Toponce wanted to raise some money on the property.
222 Q. You mean he wanted to borrow money on that security?
A. Yes, sir.
Q. You base your judgment that the services—what such services would be worth, rather upon the assumption that the services were well done and loyally done?
A. I should.

ADAM KUHN, called for the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. ROGERS:

Q. Mr. Kuhn, what is your business.
A. Merchandising.
Q. How long have you been engaged in business in this western country?
A. Twenty-five or thirty years.
Q. State, if you please, all the different kinds of business you have been engaged in during that time.
A. Well, a little of everything; merchandising principally.
Q. Hides and wool, teaming?
A. Teaming. Also keep some horses; raise horses some.
Q. Ever been in the sheep business?
A. Been in the sheep business.
Q. Engaged in buying and selling furs and wool?
A. Yes.
Q. Are you acquainted with the Corinne Mill, Canal & Stock Co.?
223 A. Well, I don't know who the company is, but I know some of them.
Q. You know of such a company?
A. Yes.

Q. Have you ever done business with it?
A. Yes.
Q. Do you know Mr. Kerr, the president of that company?
A. Yes.
Q. State, if you please, without going into detail, the nature and kinds of business transacted between you and that company.
A. Well, I never did a great deal of business with them. I keep a lot of horses up there on their ranch; that's about all.
Q. Did you ever have any conversation with Mr. Kerr concerning any business or proposed business to be transacted with the company?
A. Very little.
Q. Were you familiar with the services rendered by Mr. Toponce to the company?
A. I know he was manager, or claimed to be manager or tended to it. I done all my business with Mr. Toponce.
Q. You may state whether or not you had any conversations with Mr. Kerr, with regard to doing business with the company?
A. I did; some.
224 Q. What, if anything, did Mr. Kerr say to you with regard to seeing some one else who did the business for the company?

Mr. BENNETT: I object; immaterial.
The COURT: Objection overruled.
Mr. BENNETT: Exception.

A. In buying pelts, for instance, he would refer me to Mr. Toponce.
Q. What would he say?
A. He said he didn't know anything about that, to go and see him.
Q. From the character of the transactions with that company, and the character of the services rendered it by Mr. Toponce, could you say what those services would be reasonably worth per month?
A. Yes.
Q. State what those services would be reasonably worth?

Mr. KIMBALL: I object, no foundation laid for it.
The COURT: He says he thinks he can tell. You may answer the question.
Mr. BENNETT: Note an exception.

A. I think, from the business he was transacting, it was worth $200 or $250 a month.

Cross-examination waived.

E. YOUNT, called for the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. KIMBALL:

Q. Mr. Yount, what business are you engaged in?
A. Buying and selling fat cattle and sheep.

225 Q. How long have you been engaged in that business?
A. Four years, in Utah.
Q. Are you acquainted with Mr. Toponce?
A. Yes, sir.
Q. And the Corinne Mill, Canal & Stock Co.?
A. Yes, sir.
Q. Have you ever transacted any business with that company?
A. Yes, sir, I presume so; all the business I ever did was with Mr. Toponce.
Q. When was that?
A. I think that was in the spring of '86. Along in June or July, I think.
Q. What was the character of that business?
A. Mr. Waterman and I went to Corinne and bought 1,500 head of sheep from Mr. Toponce.
Q. What did you do with those sheep?
A. Shipped them to Denver.
Q. Do you know John W. Kerr?
A. Yes, sir.
Q. Was he there at Corinne at that time?
A. Well, I couldn't say positively whether he was or not. I made the contract with Mr. Toponce.
Q. Who paid for the sheep?
A. Mr. Waterman paid for the sheep.
Q. To whom?
A. My recollection is to Kerr and Toponce.
Q. Was Kerr there on the day of the payment?
226 A. No, sir.
Q. Mr. Toponce was there?
A. Yes, sir.
Q. When was the next transaction?
A. In the spring of '87.
Q. What was that?
A. I bought 785 sheep of Mr. Toponce.
Q. Where did you buy those?
A. I made the trade here in Ogden. They were bought while he was here in a company suit.
Q. Mr. Kerr there at that time?
A. Yes, sir.
Q. Where did you get the sheep?
A. The sheep were cut out at Mr. Toponce's ranch and drove to Collinston Station and loaded there.
Q. Who were present at that time?
A. Mr. Kerr and Toponce were both there when they were cut out, and went up to Collinston where they were loaded.
Q. What did Mr. Toponce do after that, if anything?
A. Well, he went with us to Pocatello, saw the sheep weighed, received the pay for them, or a check.
Q. That is the only business transaction you had with them?
A. Yes, sir.
Q. And that was entirely with Toponce?
A. Yes, sir.

227 EDWARD R. CHASE, called for the plaintiff, being first duly sworn, testified as follows:

Examined by Mr. KIMBALL:

Q. What is your business?
A. Attorney-at-law.
Q. What was your business in 1883?
A. Attorney-at-law.
Q. Whereabouts were you living and doing business at that time?
A. At Corinne, Box Elder county.
Q. Were you acquainted at that time with the Corinne Mill, Canal & Stock Co.?
A. Yes, sir.
Q. And with Mr. Toponce?
A. Yes, sir.
Q. You were the attorney that brought this suit, were you?
A. Yes, sir.
Q. By whose direction, if any person's, did you bring that suit?
A. By the direction of Kerr and Toponce.
Q. By the direction of John W. Kerr and Alex. Toponce?
A. Yes, sir. I had Mr. Toponce's request about it, and I preferred to have Mr. Kerr, and I told Mr. Toponce and he got Mr. Kerr into the office and got his instructions to draw the complaint.
Q. This is 548?
A. Yes, sir.

228 Mr. BENNETT: What case is that?

A. The replevin case. This wasn't the case I especially asked the endorsement of Mr. Kerr. Mr. Kerr gave the endorsement in this case, and he appears as a surety on this bond.
Q. Do you remember bringing an ejectment action against William Johnson?
A. Yes, sir.
Q. In favor of The Corinne Mill, Canal & Stock Co. *vs.* William Johnson?
A. Yes, sir.
Q. Who, if any person, directed the commencement of that action?
A. The officers of the company.
Q. Kerr and Toponce?
A. Both of them.
Q. You were acquainted with Mr. Kerr during the time you were acting as attorney for the company, were you?
A. Yes, sir.
Q. State what, if anything, you did with reference to consulting him about those suits?
A. Well, all these suits in the district court—those replevin and ejectment suits for those lands up there—the attachment suit where we attached the horses, those were by the consent and knowledge of Mr. Kerr, all of them.

A. Well, state what, if anything, Mr. Toponce had to do with those various cases after they were begun?

229 A. He generally saw to getting the witnesses and all that sort of thing.

Q. Do you know whether he attended the court with respect to them?

A. Yes, sir. He was the man that attended to the company's cases. Mr. Kerr was often present, but my recollection is that Mr. Toponce attended to all the other matters, witnesses and such things.

Mr. BENNETT: I hope all this testimony will be considered under the same general objection and exception.

The COURT: Yes.

Cross-examination waived.

Mr. KIMBALL: I offer in evidence a copy of the articles of incorporation of the Corinne Mill, Canal & Stock Co. for the purpose of showing that the board of directors were all of the stockholders at the time of the organization of the company.

The COURT: That may be received.

Mr. KIMBALL: These articles of incorporation show that the company was incorporated on the 2d day of January, 1883; that it bears the acknowledgment of the probate judge of Box Elder county; that John W. Kerr, Derastus H. Spencer, Alex. Toponce, John K. Fowler, were the incorporators of the company; that John W. Kerr took $50,000 of the stock, Alex. Toponce $50,000 of shares—I mean $250,000—Alex. Toponce, 50,000 shares for $250,000;

230 Derastus H. Spencer, five shares, $25; John K. Fowler, six shares, $30; Ira H. Fowler, five shares, $25. John W. Kerr was appointed as president, Alexander Toponce, vice-president; John K. Fowler, secretary and treasurer. Paper marked plaintiff's Ex. Q, P. E. K.

Mr. KIMBALL: Those officers continued down to December, 1887.

Mr. BENNETT: I think that's true.

Mr. KIMBALL: On November 7, 1887, a man by the name of F. Peterson was substituted in place of D. H. Spencer.

Mr. BENNETT: It may stand admitted.

Mr. KIMBALL: I now offer in evidence the by-laws of that company adopted February 17, 1883.

Mr. BENNETT: We'll consider them read.

Marked Plaintiff's Ex. R, P. E. K.

Mr. KIMBALL: I now offer to show by the record of the company that there was no meeting of the board of directors subsequent to January 15, 1885, to November, '87, and it stands admitted that this board of directors continued in office until November 7, 1887.

The COURT: How do you offer to prove that?

Mr. KIMBALL: I offer a copy of the secretary's records, which shows no meeting was had between those dates.

The COURT: Have you a full, transcribed copy?

Mr. BENNETT: I have a full copy, I think.

Mr. KIMBALL: It shows no meeting up to the time Mr. Toponce continued with the company.

231 The COURT: Unless that is shown to be a full copy of the minute book, you had better put in evidence only such parts as you want.

Mr. KIMBALL: I only desire to show the same parties continued in, that's all. I offer this in evidence, with the right to use such portions of it as I may desire.

Marked Plaintiff's Ex. S, P. E. K.

Mr. BENNETT: I prefer they come in compact form?

Mr. KIMBALL: Do you admit that to be Mr. Fowler's handwriting?

Mr. BENNETT: Yes; I think it is.

Mr. KIMBALL: Mr. Bennett admits that this letter, which I will read, is in the handriting of John K. Fowler, secretary of the company.

Mr. KIMBALL: I offer in evidence this letter, addressed to Messrs. White & Son, Salt Lake City, to show an admission on the part of one of the officers of the company, the secretary, that Mr. Toponce was manager.

Mr. BENNETT: I object as immaterial and incompetent.

The COURT: This is offered for the purpose of showing he had charge there?

Mr. KIMBALL: It is in the nature of an admission of one of the other officers of the company that he was manager of the company.

The COURT: It may be received. Its effect may be considered hereafter, and, if necessary, restrained by instructions.

232 Mr. BENNETT: Exception.

Mr. Kimball reads paper.

Paper marked Plaintiff's Ex. T, P. E. K.

Plaintiff rests.

JOHN K. FOWLER, called for the defendant, being first duly sworn, testified as follows:

Examined by Mr. BENNETT:

Q. Mr. Fowler, where do you reside?
A. At Corinne, Box Elder county, Utah.
Q. How long have you resided there?
A. Since the spring of '82.
Q. Do you know the Corinne Mill, Canal & Stock Co.?
A. I do.
Q. And do you know Alex. Toponce, the plaintiff in this case?
A. Yes, sir.
Q. How long have you known the company and Mr. Toponce?
A. I've known the company since about the 1st of January, '83.
Q. You were one of the organizers?
A. Yes, sir. I can't exactly state how long I have known Mr. Toponce.

Q. At the organization, did you become a director or officer of the company?

A. Yes, sir.

Q. A director and what officer of the company?

233 A. Secretary and treasurer.

Q. State whether you have remained a director and secretary and treasurer ever since.

A. I have.

Q. Have you been familiar with the business of the company?

A. I have.

Q. In what capacity?

A. As secretary.

Q. Do you remember the transaction of the purchase of some sheep from John W. Kerr?

A. I do.

Q. State whether or not, to your knowledge, Mr. Kerr at any time, and if so when, *he* made a proposition to your company to sell to them his sheep.

A. He made a proposition, dated on the 1st day of January, I believe, '83.

Q. About the time of the organization of the company?

A. Yes, sir.

Q. Was that proposition in writing?

A. It was.

Q. With whom was it lodged, if any one?

A. With me.

Q. With you in what capacity?

A. As secretary.

Q. Would you know the writing of that paper, if you saw it?

A. I would.

234 Q. I will ask you to look at that paper and state if that is the proposition.

A. It is.

Q. Did that proposition ever come before the board of directors?

A. It did.

Q. When?

A. I believe it was on the 17th of February, '83, at a meeting of the board of directors.

Q. I'll ask you to open the book which I now hand you, being the minute book of the company, and ask you to state if you find a record of the meeting of the 17th of February, '83.

A. Yes, sir.

Q. Does the record of the meeting bear any signature authenticating it?

A. It is signed by the president and secretary.

Q. Is the record which you now have before you a record of the directors' meeting, recording the transactions of that meeting?

A. It is.

Q. Recorded by yourself?

A. Yes, sir.

Mr. BENNETT: I offer the record of that meeting, February 17th.
Mr. KIMBALL: We're not objecting to this record.
The COURT: It may be received.

Mr. BENNETT: The portion of the record containing the
235 record of meeting of February 17, 1883, I will now read, as follows: "On motion of D. H. Spencer in accordance with a proposition and bill rendered, including about 12,400 sheep and lambs, 17 head of horses and mules, 1 boro, 7 wagons, together with tents, camp outfit, and so forth, was purchased from John W. Kerr for the sum of $80,000; also 15 head of horses, as per bill rendered, for the sum of $2,575; and from Alexander Toponce, as per bill rendered, 78 head of horses, 16 head of cattle, 6 head of hogs, and wagon, harness, saddle, and so forth, amounting to $9,657; also from Mrs. Kate Toponce, as per bill rendered, 3 head of horses, amounting to $290, and from John H. L. Toponce, as per bill rendered, 2 head of horses, amounting to $155.

JOHN W. KERR, *President.*
J. K. FOWLER, *Secretary.*"

Mr. BENNETT, to the witness:

Q. State whether the proposition which I now hand you, and which you had in your hands a minute ago, is the proposition referred to in that resolution, or one of the propositions.
A. Yes, sir.
Q. You were the secretary—acting as such at the board meeting on February 17, 1883?
A. Yes, sir.
Q. State whether that proposition was copied by you at that board meeting as secretary?
A. Yes, sir.
Q. I'll ask you to look at book and state what directors were present at that meeting.
236 A. A full board.
Q. Well, who?
A. J. W. Kerr——

Mr. KIMBALL: I submit that doesn't appear in that record.
The COURT: The record says there was a full board. It may be of account to show expressly, that Mr. Toponce was present at that meeting. I don't see that it would be material outside of that.

Mr. BENNETT, to the witness:

Q. Was Mr. Toponce present at that board meeting?
A. Yes, sir.
Q. And at the time the proposition was read?
A. Yes, sir.
Q. Has that proposition been in any way tampered with, or is it now the same as it was read?
A. It's the same proposition without any alteration.
Q. Look again at the proposition, and I call your attention to the

interest clause of the proposition; do you discover any erasure or alteration upon the face of it?

A. No, sir. There is no change that I can see.

Q. It exists in your hand to-day just as it did when you read it?

A. Yes, sir.

237 Q. And upon that proposition, so far as Kerr's proposition is concerned, that resolution was passed which I have read in your hearing?

A. It was.

Proposition offered in evidence, without objection; marked Defendant's Ex. 1, P. E. K.

Q. Were you charged by the treasurer with drawing money?

Mr. KIMBALL: I submit the by-laws are the best evidence of what his duties were.

The COURT: The by-laws I suppose fully specify them.

Mr. BENNETT to the witness:

Q. What was the course of business in drawing on the company account?

Mr. KIMBALL: I submit if that is contrary to what the by-laws say it would be improper here.

The COURT: I think they would have the right to show what the course of business was under the by-laws.

Mr. KIMBALL: We withdraw that objection.

A. I was authorized to draw checks on the company account.

Q. In what capacity?

A. As secretary and treasurer.

Q. State what, if any, knowledge, the plaintiff had of that during the years '83–'4–'5–'6.

A. Well, he knew that I was in the habit of doing it, and he has received checks drawn by me, I think.

238 Q. During the years '83–'4–'5–'6, did anybody else draw checks except you, to your knowledge, and if so, under what circumstances?

A. I think, at one time when I was absent, Mr. Kerr drew some, and I don't know but Mr. Toponce did also. I think I saw them, but they were written across the face: "To be taken up by Mr. Fowler, and a new check issued."

Q. Have you present, in court, any checks drawn in that course of business by you?

A. Yes, sir; I think I have. I think they are in that statement of Toponce's amongst the others.

Q. Reed some of them, date and amount.

A. Check, 27th January, '83, for $100, in favor of Alex. Toponce.

Mr. BENNETT: We offer that in evidence.

The COURT: It may be received.

Marked Defendant's Ex. 2, P. E. K.

WITNESS: This is check No. 35, drawn February 12, 1883, in favor of Jesse Lee, on account of Alex. Toponce, $600.00.

Mr. ROGERS: That isn't on that. Don't read anything that isn't on there.

Mr. BENNETT: I offer that in evidence.

The COURT: It may be received.

Marked Defendant's Ex. 3, P. E. K.

WITNESS: Check No. 107, drawn April 18th, payable to A. Toponce Carson, $40.00.

Mr. BENNETT: I offer that.

The COURT: It may be received.

239 Marked Defendant Ex. 4, P. E. K.

WITNESS: Check No. 114, drawn April 12, 1883, for $15,00, favor of A. Toponce, on account.

Mr. BENNETT: I offer that in evidence.

The COURT: It may be received.

Marked Defendant Ex. 5, P. E. K.

WITNESS: Check No. 124, drawn April 16, 1883, for $75.00, payable to Alex. Toponce, on account.

Mr. BENNETT: I offer that in evidence.

The COURT: It may be received.

Marked Defendant Ex. 6, P. E. K.

WITNESS: Check 249, drawn June 6, 1883, for $50.00, payable to Alexander Toponce, on account.

Marked Defendant Ex. 7, P. E. K.

WITNESS: Check 274, June 15, 1883, $10.00, payable to A. Toponce, on account.

Marked Defendant Ex. 8, P. E. K.

WITNESS: Check 276, June 16, 1883, for $20; payable to A. Toponce, for wife.

Marked Defendant's Ex. 9, P. E. K.

WITNESS: Check 387, June 21, 1883, $42.10; payable to yourself, account A. Toponce, Salt Lake ex.

Marked Defendant's Ex. 10, P. E. K.

WITNESS: Check 289, June 23, 1883, payable to yourself, account ex. to hire, A. Toponce, $15.

Marked Defendant's Ex. 11, P. E. K.

WITNESS: Check 291, drawn June 26, 1883, payable to Alexander Toponce, account homestead entry, $25.

Marked Defendant's Ex. 12, P. E. K.

240 WITNESS: Check 295, June 26th, 1883, payable to A. Toponce, account wife, $10.

Marked Defendant's Ex. 13, P. E. K.

WITNESS: Check 522, drawn March 4, 1884, payable to Alex. Toponce, for $30; signed by me, countersigned by John W. Kerr, president.

Marked Defendant's Ex. 14, P. E. K.

The COURT: It is proper to say that, seemingly, all of these were drawn to order and endorsed by Mr. Toponce. You may say in the record that a majority of them are endorsed. They are drawn to order.

WITNESS: Here is a check drawn on June 7, 1884, No. 557, payable to the order of self $50; signed by A. Toponce, taken up by myself and a counter-check issued.

Mr. BENNETT, to the witness:

Q. Was that drawn at the time you were absent?

A. Yes, sir; it must have been, because Mr. Toponce drew the check and I afterwards drew a new check with the same number.

Q. And the two are attached?

A. Yes, sir.

Offered in evidence, Exhibit 15.

WITNESS: 571, drawn June 18, 1884, payable to order of A. Toponce, account Salt Lake exchange, $25.10.

Q. Is that endorsed?

A. That is one of the checks drawn to cash a draft from Mr. Rosborough.

241 Mr. KIMBALL, to the witness:

Q. Mr. Toponce didn't draw that check?

A. I think that is his handwriting.

Q. Is it his in the body of the check?

A. No, sir.

Offered in evidence, Exhibit 16.

WITNESS: Check drawn June 8, 1885, payable to the order of A. Toponce for freight, $10.00, drawn by the C. M., C. & S. Co. and signed by A. Toponce.

Marked Defendant's Ex. 17, P. E. K.

WITNESS: Check drawn May 13, 1886, No. 844, pay to order of yourself, account defendant Kentucky Mng. Co., $100.25, signed by myself. This check was charged one-half to Mr. Toponce and one-half to myself, on account of mine.

Q. What endorsement, if any, does that bear?

A. It bears no endorsement.

Mr. BENNETT: Mention the endorsements as you go.

WITNESS: Check No. 980, drawn September 19, 1887, payable to A. Toponce, freight on bucks, $15.00, signed J. K. Fowler, secretary, endorsed A. Toponce.

Marked Defendant's Ex. 19, P. E. K.

WITNESS: Check drawn July 20, 1885, payable to the order of A. Toponce, account hay, $100; signed A. Toponce, vice-president, C. M., C. & S. Co.

Marked Defendant's Ex. 20, P. E. K.

The COURT: Is that a check that was given by Mr. Toponce and recognized and paid by the company?

242 A. Yes, sir; it is in his account as voucher No. L, 141.

It was taken down to the bank, and was paid and was afterward taken up and paid by the company?

A. Yes, sir.

Q. What date is that?

A. July 20, 1885. I would state that whenever any checks of that kind were drawn, I either took them up and reissued a new one, or I stated to the bank it was all right. As a general thing I took them up.

Mr. BENNETT, to the witness:

Q. Do you remember as to that particular check?

A. No, I can't remember the particular check; but I went there, and when our bank account would come in at the end of the month and there was such a voucher in, I would go to the bank and tell them it was correct afterwards.

Q. The bank account was submitted to you and you simply passed upon it in that way?

A. Yes, sir.

Q. As secretary and treasurer of the company, did you keep an account of the cattle, horses and sheep on the ranch as turned into you by the foreman and laborers?

A. You mean for pasturage?

Q. No; cattle owned by the company.

A. Yes, sir.

Q. I'll thank you to turn to your books, showing any account of the pasturage for the cattle of Toponce or Owsley, or either of them.

243 A. This book refers to the pasturage of cattle for Lee Owsley.

Q. What is the book you refer to?

A. Ledger A, Corinne Mill, Canal & Stock Co.

Q. Kept by you as secretary?

A. Kept by me—yes, sir.

Q. Is that open to the account for ranching or pasturing of cattle for Owsley or Toponce?

A. Yes, sir. That is Owsley's account.

Q. I'll ask you to state to the jury from that book which you now have open before you, how many cattle were ranched for Owsley, or pastured for Owsley, in '83, if any?

Mr. KIMBALL: I object, irrelevant, immaterial and incompetent in this case.

The COURT: What is the object?

Mr. BENNETT: I propose to show the complete account of pasturage during the different years with reference to the testimony Mr. Toponce gave, that he owned half the cattle and made arrangements for the pasturage, and also as bearing upon his management.

The COURT: If you connect it with him, I think it will be proper.

Mr. BENNETT: That is what I expect to do.

Mr. KIMBALL: I except to the ruling of the court.

Mr. BENNETT to the witness:

Q. State what entry you have in your book in regard to the account of pasturage for the year '83, if you have any, for Mr. Owsley.

244 Mr. KIMBALL: I submit that isn't a book of original entry; doesn't purport to be.

The COURT: He has said he will connect this plaintiff directly with these entries, from some statement he has made. It is admitted with that understanding.

WITNESS: On September 8, 1884, there was a charge for ranching cattle from September 1, 1883, to September 1, 1884, $62.40.

Q. How many head of cattle?

A. Twenty-six.

Q. Who made a return of those cattle to you?

A. Mr. Owsley or Mr. Toponce. I think Mr. Owsley did. He always gave in the account of the cattle.

Q. Have you any further entries?

A. The same in 1885. I have two other entries in 1884.

Q. Relating to that band of cattle?

A. Yes, sir. December 8, to ranching 26 head of cattle, September 1 to December 1, 1884, $15.60; December 19, to ranching 30 head, September 1 to December 1, 1884, $18; December 31, ranching 56 head of cattle, December 1 to December 31, 1884, $11.20.

Q. How many cattle, then, were ranched during—from 1883 to December, 1884? All the band of 56?

A. Yes.

Q. State how many cattle Owsley pastured on the company lands up to December 31, 1884.

245 A. He pastured 26 head for a time and 30 head for a shorter period, making in all 56 head a portion of the time.

Q. Now, look to 1885; have you any charge or minutes of any transaction touching pasturage of cattle for Owsley and Owsley and Toponce during 1885?

A. Yes, sir.

Q. State to the jury what it is.

A. March 31st, pasturage fifty-six head to April 1, 1885, $33.60.

Q. Anything further in that year?

A. September 30, 1885, ranch bill to October 1, 1885, $67.20.

Q. For how many cattle and for what time?

A. Fifty-six head. It doesn't appear on the ledger, but it does on the journal.

Q. I'll thank you to get your journal and refer to that—I want to distinguish the periods.

A. This is for fifty-six head of cattle, twenty cents a head a month, $67.20.

Q. That brings it down to what date in 1885?

A. September 30th.

Q. Well, were any of those cattle pastured in any other year?

A. Yes, sir.

Q. State how many.

A. I will state that fifty-six head have been pastured and charged to Mr. Owsley up to December, 1887, and there has been no change in the charge.

Q. Who gave in the report of those cattle from year to year on that band of cattle?

246 A. Well, Mr. Owsley gave in the account.

Q. Did Mr. Toponce ever communicate to you, as secretary and treasurer of the company, the number of cattle ranched in that band or pastured in that band?

A. No, sir. I think not, unless it might have been in the start.

Q. Did he, or did he not, ever state to you that he himself was personally interested in that band of cattle?

A. At any time?

Q. Yes.

A. Yes.

Q. When?

A. Well, I'm not positive; however, I think it was in 1886 or 1887.

Q. When and where, as near as you can state it?

A. In the office of the company.

Q. Did he state at that time the number of cattle Lee Owsley had on the ranch?

A. No, sir.

Q. Did he know, Mr. Fowler, how many the company was charging pasturage for?

A. Yes, sir; I think he did. I had a settlement with Mr. Owsley and he had 26 head and we fixed the amount of the pasturage, but that amount was changed.

Q. No account was given at all?

A. No, sir.

Q. There never was during all the time till Mr. Toponce went out of office?

247 A. No.

Q. Mr. Fowler, as secretary and treasurer of the company, do you remember a certain litigation pending against the company in the justice's court and in the district court?

A. Yes; I have had some knowledge of it.

Q. Are you able to state from the books of the company, or your own recollection refreshed by the books of the company, how much, if anything, was received as proceeds from trespass suits or from pasturage suits?

A. I couldn't state from my recollection.

Q. Well, turn to your books and refresh your recollection from the books.

A. This is a statement of amounts received from suits as I find them on the books. Whether they be trespass suits or otherwise I cannot say, positively. Shall I give the amounts?

Q. Yes—but I'll ask you first, if that is a correct transcript of the books.

A. To the best of my knowledge it is.

Q. State what the books of the company show with regard to money received.

A. They show, on December 13th, there was received, account Hunsacker and others, $51.50. March 4, 1885, from suit of Etherington, $125.00. March 8, 1885, from William Sheen, costs in suit, $3.50. March 8, 1885,—this was received from A. Toponce—cash

from Horn, $10.00, and Horn's note for $40.00. December
248 11, 1885,—this isn't account of suits, but it appears on the book. It's on account of sheep pastured, Patterson & Healy, $10.00. January 10, 1884, by Mr. House, judgment against a sheep man, no name, $25.00. The sum total is $265.00.

Q. Is that all that the company has received from these suits?

A. It is all I can find from an examination of the books. From what time I had to examine, it represents the amount received from suits—"suits at law account."

Q. Who made return of these amounts?

A. Well, I presume they came through Mr. Toponce.

Q. Well, can you state that positively as to any of the items you have mentioned?

A. Yes, sir. Horn, cash $10.00 and note for $40.00.

Q. Can you state as to any other of the items—who made returns to the company?

A. I could not positively, because I have made no record who I received them from.

Q. Do your books show, or does the company's books in your charge show items of disbursements made by the company on account of lawsuits?

A. Yes, sir.

Q. Services?

A. Yes, sir, I believe I have made a statement.

Q. I think the statement I hand you may give you
249 reference to the amounts the company has paid out during the time from the 1st of January, 1883, and the 1st of December, 1887.

A. Here is July 2, 1884, to Carl Loveland in the Johnson suit, $20; sheriff, I think.

Cases in the district court: Paid E. R. Chase, $39.20; August 16, three acknowledgements, $1.50.

Q. Who were those paid to?

A. I don't recollect.

August 22, E. R. Chase, $13.10; that, I think, was costs. September 11, attorney's bill, account Johnson cases, $11.50; check 680. November 15, check to Kimball & Heywood, retainer fee, $100. On the 25th, notary's fee, $1; it doesn't say to whom paid. December 4, E. F. Morris's bill in Johnson case, $4.25. December 6, A. Toponce, in the Johnson case, $21.50. July 11, telegram to E. F. Morris, $1.70. The 13th, bill Dickson & Varian, attorney's fee, $50. Same date, telegram E. F. Morris, $1.70. Same date, two telegrams to and from E. F. Morris, one each way, $2.15. January 28, 1886, Hiram House, bill in three Smith cases, $6.45. That is all that——

Q. I'll ask you if those items were given you by Mr. Toponce.

A. I don't recollect exactly, except the Toponce bill in the Johnston case.

Q. Is that indicated as money paid out by him and to reimburse him for that?

A. Yes, sir.

250 Q. Any other items of that character?

A. Well, there's telegram, I apprehend——

Mr. KIMBALL: These presumptions don't go.

Mr. BENNETT to the witness:

Q. State the fact, if you know.
A. Dixon & Varian, attorneys' fee, $50.00.
Q. What date have you got that under?
A. July 13, 1885.
Q. Does it say in what suit?
A. No, sir.
Q. Then this bill for expenses was presented to you for audit and payment by Mr. Toponce?
A. I think so.
Q. Well, was there anything else, either for attorneys' fees, costs of any sort in the litigation, if you know?
A. I don't think there was any other presented by Mr. Toponce. There has been fees paid to E. R. Chase.
Q. Well, E. R. Chase has an account on your books?
A. Yes, sir.
Q. That was a transaction between the company and Chase?
A. Yes, sir. He was attorney for the company.
Q. As secretary and treasurer of the company, had you any knowledge, during the years '83, '4, '5, '6, '7, as to a band of horses owned by the company?
A. Yes, sir; I was aware the company owned a band of horses.
251 Q. Do the books show anything in reference to the number of horses owned by the company?
A. Yes, sir; I believe they show the number purchased and sold.
Q. I will thank you to find the record of them on the books. I will ask you, as secretary and treasurer of the company, to state the number of horses on the ranch belonging to the company?
A. Yes, sir; on March 1, I think, or some time in March——
Q. Of what year?
A. 1887.
Q. At any other time?
A. In October, I believe, 1887, there was another count made.
Q. By whom were the returns made?
A. They were made by Mr. Owsley or Mr. Toponce, or both.
Q. Can you say that Mr. Toponce made either of those returns, or any return of the number of horses?
A. I cannot; Mr. Owsley usually attended to such affairs.
Q. I'll ask you to refer to your books and state to the jury what number of horses were returned in the March report and what number in the October report?

Mr. KIMBALL: I object to that, unless Toponce is connected with it; and I make the further objection, if the report were in writing, the writing is the best evidence.

252 Mr. BENNETT, to the witness:

Q. Are there any papers?

A. I have an inventory I made of the horses of the Corinne Mill, Canal & Stock Co.'s horses. There was no written report made by either Mr. Owsley or Mr. Toponce. They was just handed in as they was counted by Mr. Owsley, and I kept an inventory of this kind.

Q. And you made up a report from their statements?

A. Yes, sir.

Q. You're not positive as to whether Mr. Owsley ever made a written statement in regard to the number of horses in the range?

A. No—no positive statement of the total number.

Q. The statement you have was taken down by you from the information Owsley gave in the office?

A. Yes, sir.

Q. I'll ask you to state from that statement, how many horses were reported on the range in March?

A. Stallions 5, geldings and mares not separated, 233, two-year-olds, 7; total, 245.

Q. Well, now state what returns, as taken down by you from Mr. Owsley in October, showed.

A. I will state that doesn't include the sucking colts.

Q. Have you any knowledge of how many sucking colts there was?

A. No, sir.

253 Q. Pass to the October statement.

A. Well, on that statement I find 81 mares, 41 geldings, 8 stallions, 30 yearlings, 34 two-year-olds and 52 suckers; total, 246.

Q. What date was this statement made to you?

A. In the month of October.

Q. Of '87?

A. Yes, sir.

Q. And you say Mr. Toponce made no statement to you in regard to the number of horses?

A. He made no report to me; no, sir, no report by which I was guided.

Mr BENNETT: I offer this statement in evidence.

Mr. KIMBALL: I have no objection.

The COURT: It may be received.

Marked Def't's Ex. 21, P. E. K. And Def't's Ex. 22, P. E. K.

Q. You know John W. Kerr, do you?

A. Yes, sir.

Q. What relation does he bear to the defendant company?

A. He is president and a director.

Q. He was one of the corporators, was he, in the year '83?

A. Yes, sir.

Q. What, if any relation, has he borne to the company from its organization to the present time?

Mr. KIMBALL: I submit the record shows that.

254 The COURT: That is a matter of identity. That is shown by the record, unless some question of identity should arise.

Mr. BENNETT, to the witness:

Q. You know Mr. Kerr personally?
A. Yes, sir.
Q. Where did he reside during the years '83–'4–'5–'6?
A. He resided in Corinne the greater part of the time.
Q. State whether or not during that time he acted as president and director of the company at Corinne.
A. Yes, sir.
Q. You may state generally what line of service, if you know, Mr. Kerr performed for the company.
A. I considered him generally in charge of the business.

Mr. KIMBALL: I object to what he considered.
The COURT: That may be stricken out.

Mr. BENNETT, to the witness:

Q. You may state what he did with regard to the company's business. I don't mean at board meetings, other various kinds of business.
A. He looked after the sheep in Wyoming—herds of sheep he had.
Q. Are those part and parcel of the proposition put in evidence?
A. Yes, sir.
Q. Well, what else?

255 A. Looking after and superintending the running of the mill—in fact, he gave orders generally, not only to me, but to others.
Q. You may state what portions of the time Mr. Toponce was attending to the business of the company during the years '83–'4–'5–'6, if you have any knowledge?
A. I couldn't state just how much time he spent there. He was living there all this time, I think, from June, '83.
Q. But how much of the time was he away?
A. He was at San Francisco several times in regard to land—payments on land, and so forth, and in Wyoming quite a number of times.
Q. When did he move from Corinne, if at all?
A. Somewhere about the 1st of January, 1887.

Cross-examination.

Examined by Mr. KIMBALL:

Q. The checks that were first drawn in 1883, payable to Toponce on account, some of them; at that time Mr. Toponce had a credit on the books of the company, didn't he, for some $10,000.00?
A. Yes, sir. He had a credit on the books.

Q. And these checks were drawn upon that account and charged to that account?

A. Yes, sir.

Q. Drawn against the account and charged to the account?

A. Yes, sir.

Q. Where you have introduced checks in evidence payable to Toponce on account, or on account of his wife, they were pay-
256 ments on the account the company owed him, wasn't it?

A. Yes, sir; they were checks against his account.

Q. He had credit during the whole of '83, didn't he?

A. I think he did. I'm pretty sure he did.

Q. Well, refer to your books and tell us exactly what credit he had during the year '83?

A. He had credit during the whole of '83, from about the 1st of February.

Q. What was the amount of that first credit?

A. The first balance I find here is for $7,148.60, on the 20th of February. That is the commencement of the main account.

Q. Of 1883?

A. Yes, sir.

Q. These checks were drawn against that account and were charged to it, were they?

A. Yes, sir.

Q. And also the checks that were paid on account of his wife?

A. Yes; as vouchers to his statement.

Q. Now, in *in* 1884 wer-n't that the same way?

A. Yes, sir; all of those che-ks I have read appeared on his statement of account.

Q. These checks were paid out on his account as the company owed him at that time, wer-n't they?

A. Yes, only there was a credit to him—some of the checks
257 he got one thing and another for the company. Some of these were drawn when he was indebted to the company.

Q. When did he first become indebted to the company, in '84?

A. No; he was not indebted to the company in '84.

Q. How many checks were there in '85 you drew payable to him among those you read over?

A. I don't remember. I didn't keep track of it.

Q. Wasn't more than one check drawn to him by you, was there?

A. I didn't pretend to read all that were drawn. They told me to hurry. I didn't require all.

Q. Now, you refer to your checks again and give us the number for 85–'6 and '7.

The COURT: Can't that be gottten at some easier way than to go through all of that pile of papers? He says he has got an account book here that shows them all. The checks, probably, won't show more than the book, will they?

Mr. KIMBALL: I should think so.

The COURT to the witness:

Q. Will the checks on their face show more than the book does what they were drawn for?

A. No, sir, I think not.

Mr. KIMBALL to the witness:

Q. Can you give us the number of checks and the date?

A. Three checks drawn in 1885.

258 Q. How many were drawn in 1886?

A. I find one in 1886.

The COURT, to the witness:

Q. Were those drawn to Mr. Toponce?

A. Yes, sir.

Mr. KIMBALL, to the witness:

Q. Do you know what that check was for?

A. It was a check on account of a mine.

Q. That's the check you mentioned awhile ago as having been drawn by you on the company account to pay your and his private debt on some mine?

A. Yes, sir.

Q. And you charged half the check to his account and half to yourself?

A. That's the way.

Q. When did you begin to deposit the moneys of the company to the credit of John W. Kerr?

A. Well, I have no recollection in regard to that. I never deposited any money to the individual credit of John W. Kerr.

Q. Who did?

A. He insisted upon it that all sheep money received should go to him and he would take that and give the company credit for it.

Q. All sales of wool, then, were credited to John W. Kerr's individual account, weren't they, or charged to his account whenever he took the money?

A. No, sir; not all. In regard to sheep, there have been

259 moneys paid to Mr. Toponce and moneys have been, for the time, deposited in the bank at Corinne, and in some cases some even has been used. In others it has went to Mr. Kerr.

Q. In a majority of cases the money all went to Mr. Kerr?

A. Yes, sir; he claimed that.

Q. And Mr. Kerr drew his checks for the payments on the part of the company after 1885, didn't he?

A. No, he didn't draw all the checks.

Q. As a general thing he drew his checks himself on his individual account.

A. Not for the company; he drew his own personal checks. He claimed he had no right to draw the checks of the company.

Q. But he drew his own personal checks for the payment of the bills of the company.

A. Yes.

Q. When did that kind of business begin?
A. Well, that would be hard to answer, for he drew his own personal checks way back in 1884.
Q. He has an account on your books, hasn't he?
A. Yes, sir.
Q. And there has always been a balance on the books of the company in his favor, hasn't there?
A. There has.

The COURT, to the witness:

Q. That is, the company owed him?
A. Yes, sir.

Mr. KIMBALL, to the witness:

260 Q. And he has been charged with that wool money, hasn't he?
A. I think, as a general rule, he has.
Q. And other moneys that come into the treasury of the company have been transferred to that account too, haven't they?
A. I don't recollect anything now except such as would apply on the sheep, the sale of sheep.
Q. Will you turn to the account and see?
A. In August, 1884, there was $3,650 charged to his account on account of sheep.
Q. Well, on what other accounts did he have credit beside sheep?
A. Well, on July 2d there is an item of $4,000; it doesn't say for what.
Q. Do you know, independent of the charge, what it was?
A. I do not.
Q. What year was that?
A. That was in 1885. There is another item, January 7th, $13,347.
Q. Was that money paid to the treasurer of the company or paid directly to the company or to Mr. Kerr or on his private account?
A. I think it was paid directly to Mr. Kerr.
Q. What was that for?
A. Sale of land.
Q. That went to the credit of Mr. Kerr without going through the treasurer's hands, did it?
261 A. As a general thing they did. He generally settled up those matters himself and then he'd give me an account of it.

The COURT, to the witness:

Q. Have himself charged with it?
A. Yes, sir.

Mr. KIMBALL, to the witness:

Q. That land sale was a sale to Mr. Walker, was it?
A. Yes, sir. Here's an item: W. F. Miller, account land, $864.25.
Q. That was the company's land, was it?
A. Yes, sir.

Q. Now, who made the sales of those lands?

A. Mr. Toponce negotiated the sales, under a commission.

Q. Now, when did you cease to recognize the authority of Mr. Toponce to direct you to draw checks, as secretary and treasurer?

A. I have never recognized the authority of Mr. Toponce to direct me to draw checks any more than any other man.

Q. You have recognized his saying bills were correct and drew a check for that?

A. I have refused, time and again, to make credits on the books to him, or to make a charge at his direction. I have refused to allow accounts that he has produced until they could be placed before Mr. Kerr.

Q. Isn't it a fact that you have recognized nobody's authority since 1885?

262 A. In the general management of the business, yes, sir.

Q. It is a fact—I mean with reference to payment of bills, payments of accounts?

A. No, sir; not at all times. There were some bills I wouldn't recognize.

Q. Mr. Toponce reported to you items of expense repeatedly, from time to time, and you would refuse to give him credit on the books, didn't you?

A. No, sir.

Q. Hasn't he done that once?

A. Items of expense?

Q. Yes.

A. No, sir.

Q. Incurred by him in the business of the company?

A. No, sir.

Q. He has not?

A. No, sir.

Q. Now, referring to Mr. Kerr's account, you have allowed him interest on that account from time to time, haven't you?

A. Yes, sir.

Q. You have credited up the interest at that rate?

Mr. BENNETT: I object to that; immaterial.

The COURT: What is the object?

Mr. KIMBALL: To show the course of business of this company.

The COURT: What is claimed for that? Mr. Toponce
263 testified that Mr. Kerr had interest, and that was one reason he didn't take any credit against the company, because it would deplete the funds of the company.

Mr. KIMBALL: We want to show that about all the money of the company was going to Mr. Kerr, and that they were paying him 1 per cent., compounding the interest monthly, all the receipts of the company going to Mr. Kerr. It bears upon this man's testimony as to the course of business there and the method of drawing checks. He testified in answer to Mr. Bennett that all the funds of the company were turned over to him and he drew all the checks.

The COURT: As bearing upon that point, you may take the testimony.

Mr. BENNETT: Note an exception.

A. One per cent.

Q. When did you make those credits with reference to time?

A. Monthly.

Q. And the next month that interest would bear interest at the same rate?

A. Yes, sir.

Q. Now, after 1885, didn't Mr. Kerr draw his individual checks for the accounts of the company?

A. Not for all; no, sir.

Q. From 1883 down to the time Mr. Toponce left the company, which was in December, 1887, wasn't it?

A. Yes, sir.

264 Q. During that time, who had charge of the general business outside of the office?

A. Up to that time?

Q. Yes.

A. I have no official knowledge of any one having full charge of any part of the business.

Q. Well, don't you know that Mr. Toponce superintended the ranch?

A. No, sir. I do not.

Q. You don't know that?

A. No, sir.

Q. Don't you know that Mr. Toponce made contracts for the taking of cattle and sheep to pasture?

A. I do know that he has done so.

Q. Don't you know that he had it done constantly during those times?

A. I suppose he did. He and Mr. Owsley together. There was no particular contracts.

Q. Don't you know that the men were employed by him and under his supervision during that time?

A. Yes, sir.

Q. Now, when was it that Mr. Owsley first became the owner of those sixteen head of cattle?

A. I could not say.

Q. Those sixteen head were the cattle originally turned over to the company by Toponce, were they?

A. It was.

Q. And the company sold them to Owsley, didn't they?

265 A. Mr. Toponce sold them to him.

Q. Do you know how he came to make that sale?

A. He said he made it because it was all the cattle they owned, and he didn't think it worth while to remain in the cattle business.

Q. When did he make that sale to him?

A. I do not know.

Q. Now, Mr. Owsley, after he became the owner of that band of cattle, pastured them on the company's lands, didn't he?

A. I so understand it.

Q. Well, didn't Toponce report to you at the time he made the sale to Owsley, that he had sold them to him? Didn't he make a contract with Owsley and report it to you?

A. No, sir. I have no such report.

Q. How did you come to make that charge for pasturage?

A. I find no record of sixteen head of cattle.

Q. The sixteen head of cattle I'm talking about is the sixteen head sold by Toponce to Owsley.

A. I understand from my books that there were twenty-one head of cattle first charged up as pasturage.

Q. That was cattle belonging to Mr. Owsley?

A. I understood at that time that the sixteen head were entirely distinct from this lot.

Q. Well, who made the first report to you with reference to the cattle and pasturage contract with Owsley?

266 A. Mr. Toponce told me.

Q. Well, from time to time, who reported to you the increase of those cattle, if any?

A. No increase of cattle was ever reported.

Q. Well, how did you come to jump from twenty-six head to fifty-six head?

A. I won't say whether Mr. Toponce reported it, or Mr. Owsley; one or the other.

Q. You made a charge every quarter, or thereabouts?

A. I made it at different intervals, sometimes a month and sometimes as high as six months.

Q. Well, don't you know that Mr. Owsley never has ranched any more than fifty-six head of cattle at any one time?

A. No, sir. I do not know it.

Q. Don't you know that he was selling off his band of cattle constantly?

A. Yes, sir.

Q. And that the average number of cattle — had on there at any one time did not run over fifty-six head?

A. No, sir. I have no information.

Q. You say you never had any report from Mr. Toponce of the expense incurred by him in the lawsuits?

A. No, sir.

Q. Well, do you remember a suit of the company against Dick Smith, several years ago?

A. I think there was a suit against R. Smith.

267 Q. Well, he paid that judgment, didn't he?

A. I don't know as to that. You will see from the testimony I have given what has been paid on account of lawsuits. In saying Mr. Toponce has never reported anything to me, I mean to say nothing but what I have.

Q. How much was the judgment against Dick Smith, if you remember?

A. No, sir. I do not.

Q. Didn't you take notes of Smith, yourself, for that judgment?

A. I don't remember of having done it. I may have done it.

Q. You don't seem to have any credit on the books for that judgment?

A. No, I don't find any.

Q. Didn't you take the notes of Dick Smith, indorsed by Willis Booth, at the time you charged up $10, and something paid to House for costs?

A. It's possible I may. I say I don't know. I say I have now no knowledge.

Q. How is it that you have no memorandum on your books?

A. I was just going to explain that it may be on some other book.

Q. In the case of the company against Jim Allen on his contract for pasturage, where you said you gave an order on the justice for the judgment, was that money paid to the company?

268 A. Not as I understand it; no, sir.

Q. Well, is it not a fact that that was paid on the order of the company?

A. I have reason to believe it was accepted. I wrote a note to Mr. Church, asking him to pay me over the judgment. He refused, stating he would pay the judgment to no one but Mr. Kerr. I says, "I am perfectly willing you should pay it to Mr. Kerr." Afterwards Mr. Toponce went to Mr.——

Q. I don't ask you about that.

A. Mr. Toponce went and drew the money; at all events he turned in to me a statement of so much money.

Q. What did you do with that statement?

A. That statement I kept on file for a time, and in trying to hunt it up a while ago I couldn't find it.

Q. Mr. Toponce rendered a statement of that money received by him, and how paid out?

A. He did.

Q. And you don't give him any credit for the money paid out, or charge him for the money received?

A. No, sir.

Q. Now, didn't you know of the pendency of the suits in this court here against Johnston and others?

A. Yes, sir.

Q. Mr. Kerr knew of them, too, didn't he?

A. I knew of the suits.

Q. Well, didn't Mr. Kerr know of them, too?

269 A. I don't know whether he did or not. I presume he did.

Q. The company retained Kimball & Heywood in those suits, didn't it?

A. I couldn't tell you. They retained them in one suit, I know.

Q. Any more than one of the suits we were in?

—. ——.

Q. Weren't you down here one time with reference to those suits before Kimball & Heywood were retained in them?

A. I don't remember.

Q. You had charge of the moneys paid out?
A. Yes, sir.
Q. Do you remember a fee you paid me of $100 paid out?
A. Yes, sir.
Q. Wasn't that in the Johnson suits?
A. I suppose it was. I don't deny knowing of the suits, but I have no knowledge as to how they were conducted, or anything about them.
Q. You knew Mr. Toponce was paying out money in them, didn't you?
A. I think he told me he was paying out money.
Q. Did he report to you from time to time what he was paying out?
A. No, sir.
Q. Item $400, paid to me; do you remember of that bill's being presented to the company?
A. I don't remember now.
270 Q. Don't you remember that I sent that bill to you as secretary of the company?
A. I don't remember now, no, sir.
Q. Didn't you write back, saying you couldn't pay that until Mr. Toponce returned from Wyoming, where he was?
A. I don't remember. I may have done it.
Q. Didn't you call Mr. Toponee's attention to it when he came home?
A. I wouldn't say as to that, because it is a new thing to me.
Q. Don't you know that he remitted it from Corinne, and didn't you write the letter containing the remittance?
A. I don't know that I did.
Q. You won't say you did not?
A. I won't say I did not. At that time I wrote a great many letters for Mr. Toponce.
Q. Were you a witness in the case of the company against James Allen, before Justice Church?
A. Yes, sir.
Q. Did you swear in that suit that Mr. Toponce was general manager of the company?
A. No, sir.
Q. You didn't so testify?
A. No, sir.
Q. Before Justice Church in that suit?
A. No, sir.
Q. Or manager, without the general?
271 A. I testified he had authority — make contracts for the pasturage of cattle.
Q. You didn't testify he was manager of the company?
A. No, sir.

The COURT, to the witness:

Q. Mr. Fowler, you have testified to the receipt of several items

by Mr. Kerr, one of $10,000, and so on; was that charged to himself on the books of the company?

A. Yes, sir.

Q. At that time was he a debtor or creditor of the company?

A. He was a creditor.

Q. That is he had a credit on the books of the company?

A. Yes, sir.

Q. How long during that time?

A. At that time, on the 14th, he had a credit of $44,209.10.

Mr. KIMBALL, to the witness:

Q. Referring back again to the proposition, do you remember when Mr. Kerr began his suit against the Corinne Mill, Canal & Stock Co. for the sheep?

A. It was, I think, somewhere in 1887.

Q. Well, do you remember about the time—I don't care for the date?

A. Yes, I remember the time.

Q. Didn't Mr. Toponce go to you at that time and ask you how that note was to have interest?

272 Mr. BENNETT: That is immaterial.

The COURT: What is the object of that?

Mr. KIMBALL: To show that Mr. Toponce had no knowledge of that note.

The COURT: That would be a self-serving declaration. I am inclined to think that isn't proper. The objection may be sustained.

Mr. KIMBALL: Note an exception.

Q. Mr. Toponce reported to you at the time he bought an interest in the cattle of Mr. Owsley, didn't he?

A. No, sir. He did not report that he was interested.

Q. Didn't he report it to you, and didn't you charge him on the books of the company?

A. No, sir. That's a private memorandum book I kept of his.

Q. Didn't you afterwards, at the instruction of Mr. Kerr, charge the cattle back to Mr. Owsley and the money to Toponce?

A. Are you speaking of the sixteen head of cattle?

Q. Yes.

A. Oh, yes; he reported that.

Q. You understood at the time he bought them—he reported that to you at the time he bought them?

A. Yes, sir. I suppose it was at the time.

Q. And subsequently he reported to you that he bought an interest with Lee Owsley?

A. No.

273 Q. Didn't he tell you at the time he became interested in the cattle?

A. He told me about the time I commenced keeping that book for him. That was the first I knew about it.

Q. Who does the money for those cattle stand charged to on the books of the company?

A. The entry says, debtor, February 14, 1887.
Q. Who is it charged to?
A. It was charged at that time to A. Toponce, for sixteen cattle sold to Lee Owsley, July, 1886.
Q. Well, was that entry subsequently changed, or another charge made of that money?
A. I think there was. I would have to trace that through.
Q. Who is it charged to subsequently?
A. Lee Owsley.
Q. How did that charge come to be made?
A. Because Mr. Kerr said he wouldn't stand it. It must be charged to Owsley.

The COURT, to the witness:

Q. The first entry there is that where the company purchased them?
A. No, the first entry is where he sold them, reported them to the company as sold, and asked that the money be charged to his account.
Q. It was then charged up to him?
A. Yes. Subsequently to that it was changed and charged to Mr. Owsley's account. Mr. Kerr refused to allow this to go
274 on his account—on the books at all; in fact, he said he didn't think it right to sell them.
Q. Mr. Kerr said?
A. Yes. He at last said to make that entry. Whether that has been charged to Toponce or Owsley, I'll not be certain which. I can tell by reference to the books.
Q. Is that the transaction by which Mr. Toponce says he took an interest with Owsley?
Mr. KIMBALL: Yes; that is the $400 that was paid to me as attorney in the Johnson cases.
WITNESS: It was January 31, 1888, that was charged to Owsley and credited to Toponce.

Mr. KIMBALL, to the witness:

Q. That was after Owsley and Toponce both were out of the company, wasn't it?
A. Yes, sir.
Q. Who now and has ever since Toponce quit the employment of the company, transacted the business that was formerly done by him?
A. Jim Pitt.
Q. Is Tom Pitt employed by the company at all?
A. Yes, sir.
Q. In what capacity?
A. *From* Pitt is——

Mr. BENNETT: I object; immaterial.
The COURT: What is the object?

Mr. KIMBALL: To show they have employed men to do the business that Toponce did.

275 The COURT: How does that bear upon it?

Mr. KIMBALL: It shows they have recognized the office.

The COURT: I don't think that would be proper. Objection is sustained.

The COURT, to the witness:

Q. Mr. Fowler, please turn to Mr. Toponce's account; you testified before that all these checks were drawn against his account and were charged up to him?

A. Yes, sir.

Q. Now during that time has he credits along there?

A. Yes, sir. He has credits and debits at all times—different times.

Q. What is the general character of those credits—how would they come about?

A. Here is mill account charged, bill expenses to Ogden and Mr. Toponce's account credit, $5. That is for his expenses coming to Ogden upon some business, I don't know what.

Q. Well, that would be borne by him, as I understand it, and he would report that to you and he would take credit for it?

A. Yes, sir.

Q. And then these expenses were credited to his account, and the checks went against it?

A. Yes, sir.

Q. And both went onto his account?

276 A. Yes.

Mr. KIMBALL to the witness:

Q. His original credit was for property sold to the company?

A. Yes, sir. That was his credit.

Q. That was his credit for horses and cattle, etc., nine thousand and some odd dollars?

A. Yes, sir.

The COURT to the witness:

Q. If I understand you, then the substance is this: He took credit on the books of the concern.

A. Yes, sir.

Q. And then, from time to time, he was given money in the way of checks and they were charged to his account, and he would report to you and take credit on the books of the company for expenses and matters which he wished the company to receive pay for—for matters furnished to the company from time to time?

A. Yes, sir.

Q. That was the usual course of business?

A. Yes, sir.

Redirect examination.

Examined by Mr. BENNETT:

Q. When did the balance change from debit to credit on Toponce's account?

A. About the 1st of August, 1885. On the 31st of July he had a credit of $44.77, and on August 3 he was debited.

Q. Leaving a balance of how much?

277 A. $181.97.

Q. Has that balance ever changed back to a credit balance, or has it been a debit balance ever since?

A. I don't think it has.

Q. It has never changed back to the other side of the book?

A. No, sir.

The COURT, to Mr. Bennett: Do you expect to show, Mr. Bennett, by this witness, or any other, whether this account was ever closed or adjusted?

A. Yes, sir. I claim a balauce due in our counter-claim of three thousand and some odd dollars on that account.

Q. Then, there is somewhere in the case what the final result of that account was and whether it was settled or not?

Mr. BENNETT: Yes, sir.

Recross-examination.

Examined by Mr. KIMBALL:

Q. Toponce wasn't allowed any interest on his credits, was he?

A. He never claimed none.

Q. There was none ever credited up?

A. No, sir.

Q. Would you have credited him with any if he had claimed it?

A. I made out his statement of interest and told him I thought he would be entitled to it if he would have the statement

278 made out and handed to Mr. Kerr. I made a statement out up to the time the balance changed.

Q. Did you call Mr. Kerr's attention to it?

A. Yes, sir.

Q. What did he say about it?

A. He made no objection to it at all.

Q. There never was any credited up to his account?

A. No.

Redirect examination.

Examined by Mr. BENNETT:

Q. At whose request did you make out that statement?

A. Mr. Toponce's.

Q. When?

A. O, it's a long time ago; I couldn't say to the year.

Q. So he had you make a statement as to the interest account?

A. Yes, sir.

MARCH 16, 1889—10 a. m.

J. K. FOWLER, recalled for the defendant.

Examined by Mr. BENNETT:

Q. Have you the books of the Corinne Mill, Canal and Stock Co.?

A. Yes, sir.

Q. I'll ask you to state when the account with Toponce opened?

279 A. In January, 1883.

Q. State the first item of the account.

A. The first item is $5.

Q. Read the entry.

A. January 20, for wife, $5.

Q. Have you taken from the books of the com— a running account of Toponce with the company?

A. Yes, sir; in connection with that other $5 there was one on the same day—$5 for 500 of bran. These two were balanced on the 26th and the account commences on the 27th.

Q. You state you have made a statement of the account?

A. Yes, sir.

Q. Produce the original of that statement?

A. I believe that is the original.

Q. Is that the one which exhibits the vouchers?

A. No, sir; that is not the one.

Q. State whether the paper I now hand you is the statement from the 1st of January down to what date?

A. Yes, sir, it is. Down to July 16, 1888.

Q. Is the account which you now have in your hands a true statement of items shown on the books of the company as to the Toponce account?

A. It is.

Q. I will ask you to state what the paper is which I have just now handed to the court.

A. That is a copy of that statement.

280 Q. Is the statement which I have just now handed to Mr. Kimball a copy?

A. It is all the same to the best of — knowledge.

Q. Have you the books of original entry before you?

A. Yes, sir, I have.

Q. Consisting of what?

A. Day book, journal, merchandise ledger and the blotters to that.

Q. Are those all the books kept by you, as secretary of the company, showing this account or any part of the account?

A. Yes, sir.

Q. I'll thank you to be more explicit as to the books, naming the books by letter or number.

A. There is no letter or number on them. Of course, I refer to them as journal or ledger A, B, C, D, but there is—I believe some

of them may have, but this ledger has no letter or number on it, neither on the last one that I call C.

Q. How many books are there in which this account appears or any part of it?

A. There are thirteen of them, I believe.

Mr. BENNETT: I offer those thirteen books in evidence, so far as they show an account between Toponce and the company.

Mr. KIMBALL: We object to all except the books of original entry.

281 The COURT: Does that offer include the books of original entry?

Mr. BENNETT: It does.

The COURT: I think it is proper the compiled account go along with that as explanatory simply. They may be received.

Statement account offered in evidence, Ex. 22½.

Mr. BENNETT to the witness:

Q. Referring to the manuscript or copy I will ask you to take the vouchers which you have in the bundle there and submit them in their order as they apply to the items; first to the reporter for marking and then to the court and jury.

A. The first check is No. 18, January 27, 1883—Pay to the order of Alex. Toponce, account exchange or order, signed J. K. Fowler, secretary. That is the first item.

The next item in the account is credit January 31, three beef hides, 206 pounds, $3.10. There is no voucher for that; it is a credit.

The next is a debt to merchandise per bill, voucher No. 2, $26.45. Voucher No. 2 is for merchandise furnished to the plaintiff from the store of the Corinne Mill, Canal and Stock Company.

The next voucher is No. 3, February 1.

Mr. KIMBALL: There is no trouble going down to and including November 30, 1887; we admit that account down to November 30, 1887. At that time a balance against us of $2,073.05.

282 Mr. BENNETT to the witness:

Q. What are the items, if any, of that account after November 30, 1887?

A. February 17, 1888, account hiring house, voucher 175, $92.97. This account is on account of a settlement had between the company and Mr. Toponce and hiring a house. He instructed me to find out the balance due and charge to his account and I did so.

The COURT to the witness:

Q. Who instructed you to do that?

A. Mr. Toponce.

April 30th, debit to John W. Kerr costs of suit of Luce *vs.* The Company to perfect appeal.

Mr. KIMBALL: We object to that item being charged or going in here as not material to the controversy and not competent. It

is stated to be an account for costs paid by John W. Kerr for a suit against the company.

The COURT: They will have to show it as a proper claim against the company before they can recover for it—that it is a proper charge against Mr. Toponce and in favor of the company. What else they may show about it I don't know as to whether it should be a question of law or fact. He can state the facts pertaining to it.

Mr. BENNETT to the witness:

Q. State what that was paid for and how it came to be charged.

A. It occurred with regard to a contract between Mr. To-
283 ponce and Mr. Luce with regard to breaking some stock, I think.

Mr. KIMBALL to the witness:

Q. You don't know anything about that except what Mr. Kerr has told you, do you?

A. Mr. Toponce told me. When the matter came to the knowledge of Mr. Kerr he objected to the contract and wouldn't recognize it as being an account of the company. And Mr. Luce brought a suit, I believe, against the company, which was appealed to the district court.

Q. Have you that contract between Mr. Toponce and Mr. Luce with you?

A. No, sir.

Mr. BENNETT to Mr. Kimball: I demand its production.

Mr. KIMBALL: We haven't got it.

Mr. BENNETT, to the witness:

Q. Have you made diligent search among your papers for it?

A. I have.

Q. Have you been able to find it among the company's papers?

A. No, sir.

Q. Do you know what has become of it?

A. I do not, unless they have it in the papers in the appeal.

The COURT: You may go on with this and the clerk will look for it.

284 Mr. BENNETT, to the witness:

Q. Go to the next item and explain to the court and jury what it is, with the date and particulars.

A. Board of mare at Ogden, voucher 177, $15.

Q. What is the next item?

A. The next item is June 13, board of mare at Ogden, $15.

Q. Well, state to the court and jury what that was for?

A. That was one of the mares of the company sent down to Mr. Luce to handle.

Mr. KIMBALL: We don't think that is a proper charge against this plaintiff.

The COURT: It is in the account put in evidence. This is evidence explaining what it is. It may be received as explanatory.

Mr. KIMBALL: We except to the ruling of the court.

Mr. BENNETT, to the witness:

Q. How much is that item?
A. $15.00.
Q. What date?
A. June 13th.
Q. What year?
A. 1888.
Q. What is the next?
A. June 30th, cash held out of sale.

Mr. KIMBALL: We acknowledge the next item.

WITNESS: The next is cash account, sale of bucks, $130.00.

285 Q. Charged to Mr. Toponce?
A. Charged to Mr. Toponce.
Q. Explain the item.
A. It was a check drawn on Thatcher Brothers, Logan, drawn by Smart.

Mr. KIMBALL: We admit that item.

Mr. BENNETT, to the witness:

Q. Proceed to the next.
A. Cash—Nichols, $330,00.

Mr. KIMBALL: We admit that.

Q. State the next.
A. The next is for breaking stallion Aleck, to A. Kuhn amount paid C. Luce, $120.75.
Q. Under what date?

Mr. KIMBALL: We make the same objection.

The COURT: He may state what the account is for.

Mr. BENNETT, to the witness:

Q. Explain the item.
A. There is a number of papers here explaining it. It is a bill of Cheney Luce to A. Toponce debtor, taking care of horse from May 3 to October 25, 1887, 173 days I think, $173; shoeing three horses, 75 cents, making $173.75. Then there is a credit to Mr. Toponce of $50, leaving about $123.75.
Q. State to the jury why that account is charged to Toponce on the company's books?
A. It's because it was an animal turned over by Mr. Toponce to Mr. Luce for him to handle or break, and that is the bill for doing so.

286 Q. State if Mr. Toponce ever received credit for that $50.
A. No, sir.

The COURT, to the witness:

Q. Does that show that the company paid that bill?
A. It seems it was paid by Mr. Kuhn. Kuhn Bros. owed the company a ranch bill, and they paid it and charged the company up with it, and I credited Kuhn Bros. with that amount paid by them.

Mr. BENNETT, to the witness:

Q. They owed a pasturage bill?
A. Yes, sir.

The COURT, to the witness:

Q. Mr. Fowler, how did you come to do that if this was a contract made with Mr. Toponce?
A. It was by order of the president.

Mr. BENNETT, to the witness:

Q. How much was that?
A. $123.75.
Q. Pass to the next one.
A. The next item is July 12th, cash drawn from the Deseret National bank without authority, $888.74.

Mr. KIMBALL: We object to that item, too.

Mr. BENNETT, to the witness:

Q. You may state what that was for.
A. It was a number of checks which Mr. Toponce had drawn.

Mr. KIMBALL, to the witness:

287 Q. How many checks?

Mr. BENNETT: I have them here.
Mr. KIMBALL: They would be the best evidence of what they are.

Mr. BENNETT to the witness:

Q. I will ask you if that company had an account in the Deseret National bank at that time?
A. They had no account at that place at that time.
Q. Well, you were treasurer of the company?
A. Yes, sir.
Q. Did the company have any account at the Deseret National bank?
A. No, sir. No account to my knowledge.
Q. State what, if any, moneys were deposited in the Deseret National bank, when and by whom?

Mr. KIMBALL: If an account was kept there that is not the way to show it.
Mr. BENNETT: I think I must have left those checks in my room. I don't seem to have them here.
The COURT: What does the witness say?

Mr. KIMBALL: He says he didn't have any account as treasurer.

WITNESS: It is moneys deposited with the Deseret National bank, received from J. Nichols on sale of wool and deposited either by him or Mr. Nichols, I can't say which, to the credit of A. Toponce, general manager.

288 Q. The moneys were from sale of company property?

A. Yes, sir.

Q. At that time did you have an account with any bank or banks, and, if so, where?

A. Yes, we had a bank account with Mr. Guthrie at that time.

Q. Who had charge of that bank account, with reference to depositing and drawing checks?

A. I did.

Q. State, if you know, whether the company, by its board of directors or by its president, deposited that money received from the sale of those sheep in the Deseret National bank.

A. No, sir. I will state, with reference to that matter, that, in the commencement, a deposit of moneys was made with Wells-Fargo, and afterwards Mr. Toponce changed it to the Deseret National bank.

Q. But, without authority from the board of directors, or the president or the treasurer?

A. Yes, sir.

Q. What is the amount of the item charged there?

A. $888.74. Four items that make up that total. It's made up of checks drawn by Mr. Toponce as general manager.

Q. State whether or not, as treasurer, and whether or not the president received knowledge of the drawing of those checks and of the deposit and refused to recognize it.

289 A. He did; yes, sir. He said he had no authority to draw checks.

Q. Well, how was that balance withdrawn, if at all, and state if you drew the check at his order?

A. I did, as secretary, and they paid it over to Mr. Kerr.

Q. Do your books show, or do you know how much the deposit made by Mr. Toponce at the Deseret National bank was?

Mr. KIMBALL: I object. The deposit at the Deseret National bank was in writing.

The WITNESS: That can be explained this way——

Mr. KIMBALL: Hold on. He's proposing to state what the books show. The books show for themselves. They show that the deposit was made by Mr. Nichols.

The COURT: He says the entry on the book means that the sheep were in Mr. Nichols' hands.

WITNESS: I think it does.

Mr. BENNETT to the witness:

Q. You may state how much the deposit was.

A. I can't state from memory. April 1, 1888, or August 27, 1888, deposit, $220.70.

Mr. KIMBALL: How does that read?

A. It reads James Nichols. October 1, deposit, $1,212.50.

Q. By whom?

A. James Nichols.

Q. Do you know by whose direction he deposited that sheep money?

290 A. I only know from what Mr. Toponce told me. He told me he ordered it.

Q. How soon after those deposits had been made did Mr. Toponce inform you?

A. Well, I think the one on the 27th was made on the 26th of August, one day after.

Q. He informed you one day after the deposit had been made?

A. Yes, sir.

The next one, deposited September 19, was deposited August 30. The next, October 5, was deposited October 3.

Q. When did you learn of the latter two deposits?

A. About the time of entry.

Q. What is the date of your entry charging Mr. Toponce with $800?

A. That entry was made on the 16th of July, 1888.

Q. When did you first come to the knowledge of the drawing of that check for that amount?

A. I filled out the check for Mr. Toponce at his request.

Q. Do you remember when you drew out the balance?

A. No, sir.

Q. Look at the check I now hand you and state if that is a check drawn by you, as treasurer, for the balance of the account with Deseret National bank?

A. Yes, sir.

Q. What is the date of that?

291 A. November 1, 1887.

Q. To whom is it drawn?

A. John W. Kerr, president C. M., C. & S. Co., or order.

Mr. BENNETT: I offer in evidence the check.

The COURT: It may be received.

Marked Defendant's Ex. 23, P. E. K.

Q. What is the next item in the account, its date, amount and explain it?

A. It is for 700 pounds of wool sold to Mr. Carlton in 1888, $105.00.

Q. Under what date is that?

A. Under date of June 12th.

Q. When was the sale made?

A. The date it was brought down on the books was July 12th.

Q. Do you know when the wool was sold?

A. No, I do not of my own knowledge.

Q. How did you come to the knowledge that Mr. Toponce had sold the wool?

A. There was a bill of Mr. Carlton's sent down that showed it.

Q. How long was it before you made the entry that the wool was sold?

A. I'm not positive.

Q. Did you ever get any information in regard to the sale of that wool, and if so, when?

A. I'm not positive about that, but I presume he told me. He used to tell me of matters of that kind. I presume he did
292 tell me, but I couldn't state as to the time.

Q. Well, what is the next item?

A. That's all there is in this book.

Q. You have not spoken of all the items after the 30th of November, 1887?

A. Yes, sir.

Q. Mr. Fowler, have you present in court a record book of the company?

A. Yes, sir.

Q. If you have the record of the meeting of 19th of December, 1887, please open the book to it.

A. Yes, sir; I have.

Q. Is that a true and correct record of the proceedings of the meeting then held?

A. Yes, sir.

Mr. BENNETT: I offer in evidence the record of the meeting, to show the accounts were all settled that day, Mr. Toponce being present.

The COURT: What do you claim for that, that it is a settled account?

Mr. BENNETT: Yes, sir; up to that day.

The COURT: It may be received.

Mr. BENNETT: "On motion of C. W. Bennett, all of the minutes of the directors' meetings, just read by the secretary, embracing all the minutes from February 17, 1883, to November 8, 1887, be also ratified and approved."

Mr. BENNETT: In that connection, I wish to offer the min-
293 utes of the meeting of February 17, 1883, as they are referred to in that resolution, together with the portion referring to the sheep contract or acceptance of the proposition.

Reads portion referring to sheep proposition in minutes February 17, 1883.

Directors' meeting February 17, 1883, Exhibit 23 A.

Stockholders' meeting December 19, 1887, Exhibit 23 B.

Mr. BENNETT: I now offer in evidence this record complete.

The COURT: It may be received.

Mr. BENNETT, to the witness:

Q. I now hand you a package of papers, and ask you to explain them to the court and jury.

A. They are receipts and vouchers for money received. They are vouchers accompanying the merchandise ledger.

Mr. KIMBALL, to the witness:

Q. They are vouchers to the account we have admitted?
A. Yes, sir.

Mr. BENNETT, to the witness:

Q. They contain all the general account?
A. Yes, sir.
Q. I have made mistake; I show another package.

The COURT: What is the object of this, Mr. Bennett?

294 Mr. BENNETT: It shows the course of business, so far as he was concerned, and a bearing upon the first and second causes of action; the money he claims to have paid out.

The COURT: You now offer to show that he has vouchers drawn in his favor that never went onto the account at all?
A. Yes.
The COURT: As tending to show that these matters were settled as you went along?
Mr. BENNETT: Yes, sir; that's the purpose.
The COURT: Go on.

Mr. BENNETT, to the witness:

Q. What is the first paper?
A. It's a bill dated March 7, 1883, a company debt; debtor to Alexander Toponce, one and one-half tons of hay, $15.

Mr. KIMBALL: We object to that, as not material, relevant or competent here.

The COURT, to the witness:

Q. Does it show it was paid?
A. Yes, sir. Received payment, A. Toponce.

Mr. KIMBALL: It is nothing we have charged to them.
The COURT: But you have charged along before and after this time.
Mr. KIMBALL: We don't charge for that.
The COURT: I think it is proper to receive this as showing the course of business.

295 Mr. BENNETT, to the witness:

Q. What is that, a receipted bill?
A. A receipted bill—a cash voucher. And there is a check attached to it, and receipted by Mr. Toponce.
Q. Drawn by whom?
A. Drawn by J. K. Fowler, secretary, C. M., C. & S. Co.
Q. Upon what bank?
A. J. W. Guthrie.
Q. Where the company kept its account?
A. Yes, sir.

Mr. BENNETT: We offer in evidence the voucher, the receipted bill, and the endorsed check.

The COURT: They may be received and marked Defendant's Ex. 24, P. E. K.

Q. What paper do you now hold in your hand?
A. Voucher for fence posts paid to Mr. Toponce, March 13, 1883, Corinne Mill, Canal & Stock Co. to Alexander Toponce, debtor.

Mr. BENNETT: I withdraw that one.
WITNESS: The next is a receipt for money paid to Mr. Toponce, $45.00, expenses to Salt Lake, account of land.

Q. On what date was that paid?
A. April 25, 1883.
Q. What amount do you say?
A. $45.00.
Q. State whether or not it is receipted.
A. Yes, sir.
296 Q. A check to it?
A. No, sir.

Mr. BENNETT: I offer that in evidence for the same purpose.
The COURT: It may be received.
Marked Defendant Ex. 25, P. E. K.

Q. Proceed.
A. This is also a receipt for moneys paid to Mr. Toponce June 6, 1883, $3.35, expenses to Cache valley to see about a stallion.
Q. Receipted by Mr. Toponce?
A. Yes, sir.

Mr. BENNETT: I offer that in evidence.
The COURT: It may be received.
Marked Defendant's Ex. 26, P. E. K.

Q. What is next?
A. Bill of expense to Salt Lake, July 15, 1883; railroad fare and so forth, $27.50, receipted by Mr. Toponce.
Q. Check attached?

Mr. BENNETT: I offer that in evidence for same purpose.
The COURT: It may be received.
Marked Defendant's Ex. 27, P. E. K.

Q. Proceed to the next one.
A. The next is for different items. November 19, 1883, $2.50, telegram about sheep 50c., freight bill 75 cents.
297 Mr. KIMBALL: We object to that.
Mr. BENNETT: I think that is not receipted, withdraw that.

Q. Proceed to the next.
A. The next is December 17, 1883, paid expenses on bucks at Brigham City, $3.50, receipted by Mr. Toponce.

Mr. KIMBALL: We object to that, not material, relevant or competent here.
The COURT: It may be received.
Marked Defendant's Ex. 28, P. E. K.

WITNESS: July 11, 1885, amount paid for water bucket, $1.00, receipted by Mr. Toponce.

Mr. KIMBALL: We object, not competent or material.

Mr. BENNETT: We offer it for the same purpose.

The COURT: It may be received.

Marked Defendant's Ex. 29, P. E. K.

Q. Proceed to the next item.

A. September 22, 1885, expenses to sheep camp after bucks, $1.50, receipted by Mr. Toponce.

Mr. BENNETT: I offer that.

Mr. KIMBALL: Same objection as to all of them.

The COURT: It may be received. They may all be received and an exception entered.

Offered in evidence Ex. 30.

Mr. BENNETT, to the witness:

Q. Proceed to the next voucher.

298 A. The next voucher is February 1, 1886, payable to A. Toponce, account D. Thorpe or order, for labor, $351.00, signed J. K. Fowler, secretary, and endorsed by Mr. Toponce.

Mr. KIMBALL, to the witness:

Q. Who is that payable to?

A. Payable to the order of D. Thorpe—money Mr. Toponce paid out and I drew it to reemburse him.

Mr. BENNETT: I offer that in evidence.

The COURT: It may be received.

Marked Defendant's Ex. 31, P. E. K.

Q. Proceed to the next.

A. The next is June 14, 1886, to amount paid One-eyed Riley, $2.50, on order; $7 building sheep corral; total, $9.50. Receipted by Mr. Toponce, drawn by J. K. Fowler, secretary, and endorsed by A. Toponce.

Mr. BENNETT: I offer in evidence receipted bill and check.

The COURT: It may be received.

Marked Defendant's Ex. 32, P. E. K.

Mr. BENNETT, to the witness:

Q. Proceed.

A. The next is August 1, 1887, check drawn to A. Toponce; account of freight on wool, $20, and endorsed by Mr. Toponce.

Mr. BENNETT: I offer that.

The COURT: It may be received.

Marked Defendant's Ex. 33, P. E. K.

Q. Next.

299 A. The next is a receipt—received from A. Toponce, July 11, 1885, $50; account professional services. Corinne Mill Canal & Stock Co. Dickson & Varian.

Q. What date is that?

A. July 11, 1885. It is not numbered along with those vouchers, but it's a receipt I happened to find.

Q. Does it appear in the original account—the account you have introduced—with the company?

A. No, sir.

Mr. KIMBALL to the witness:

Q. That is $50 you have on your books paid directly to Dickson & Varian?

A. No, sir; that account is undoubtedly the same account, but it is not charged to Mr. Toponce.

Mr. BENNETT to the witness:

Q. This, Mr. Toponce demanded, this as a sum he had paid and for reimbursement to him?

A. Yes, sir.

Marked Defendant's Ex. 34, P. E. K.

Q. Mr. Fowler, how many vouchers have you on that account which has been introduced?

A. There are 172 to the general ledger and 19 to the merchandise or petty ledger, as they call it.

Q. Well, state what numbers those vouchers bear, from what numbers to what numbers, inclusive?

A. From No. 1 to No. 171 or 172, I don't remember which, and also No. 1 to No. 19 on the merchandise ledger.

300 Q. I'll ask you now if the vouchers which you have just referred to, — items in the general account of Toponce with the company?

A. Yes, sir; all referred to the general account.

Q. That account is found in the general and petty ledger and in the books of original entry which you have here?

A. Yes, sir.

Q. And in those accounts, copies of which you have presented?

A. Yes, sir.

Mr. BENNETT: I offer those, not to sustain an account, but I offer it to show the course of business. I offered those others separate because the items did not appear in the general account.

The COURT: They may be received.

Mr. KIMBALL: I make the same general objection.

Cross-examination.

Examined by Mr. KIMBALL:

Q. All these vouchers were prior to 1885, weren't they?

A. No, sir; there is one dated 1885.

Q. That is to Dickson & Varian, isn't it?

A. Yes, sir.

Q. Isn't it a fact that after 1884 you didn't have an account of any consequence at J. W. Guthrie's bank?

A. No, sir.

Q. Have you any of the bank books with you?

301 A. No, sir; but I have books to show that account.

Q. Refer to that.

The COURT: Mr. Kimball, while he is looking that up; your cause of action, which states an account for services, is for the entire years, is it not?

Mr. KIMBALL: From 1883.

The COURT: Does the averages he makes for traveling expenses cover the whole years?

A. Yes, sir.

Mr. KIMBALL to the witness:

Q. Answer my question.

A. Yes, we had an account. At times we were behind and paid interest. We had an account there and drew checks right along.

Q. You refused to draw checks for Toponce, didn't you?

A. I think not; I don't remember whether I did or not.

Q. Didn't he present accounts to you that were never paid to him during that time?

A. No, sir. There was some disposition to everything entered up on the books.

Q. So you entered every account that came to you?

A. I won't say every account, because there might be something like I have spoken of, but nothing that I now remember.

Q. Now, referring to Mr. Owsley's bill, what did that bill consist of?

302 A. He had a bill against Mr. Toponce for some items, and the company had a bill against him for some items, and at that time Mr. Toponce had been talking with him about a horse he wanted to buy. He came in that day and produced these bills, and while I was figuring on the bills he says, "Mr. Toponce, I'll give you fifty dollars in gold coin and we'll jump accounts all around." Mr. Toponce says, "Well, that's pretty light for the horse, but I'll do it," and he authorized me to do no more figuring—pay no more attention to the stock account—balance with Mr. House, and charge him the balance.

Q. Was an account of the company's included?

A. Yes, and if I'm not mistaken, one of the bills was $.75 for Mr. Kerr. The balance due was $92.97.

Q. That is what Toponce owed him—what the company owed him and what Kerr owed him?

A. No, it was just this way, it was a jumping of accounts, and that was the dalance due.

Q. And, in jumping the accounts, you just simply closed House's account and charged it to Mr. Toponce?

A. Mr. Toponce assumed the $50.00 for the horse.

Q. The next item, April 30th, $15.00, suit of Luce against the Corinne Mill, Canal & Stock Co. that was costs paid out to perfect the appeal?

A. Yes, sir; I believe it was an appeal.

Q. That was a suit against the company, was it?

303 A. It was a suit Mr. Luce brought against the company?

Q. You drew the contract for Mr. Toponce yourself, didn't you?

A. Yes; I drew it myself.

Q. Account board of mare, overdue, that's a mare the company got from Cheney Luce, isn't it?

A. Yes; I think it was in the officer's hands at the stable, I think.

Q. At Mr. Nelson's stable?

A. Yes, sir.

Q. That was while it was in the officer's hands?

A. I suppose it was; I don't know. I simply know the mare was here.

Q. Who gave you the items; Mr. Kerr, didn't he?

A. No, I think the voucher will state there.

Q. Well, you say, J. W. Kerr, board of mare at Ogden.

A. It was his order.

Q. And this A. Kuhn affair; that was paid to Cheney Luce for taking care and handling of the horse, wasn't it?

A. I think there were two animals in the case.

Q. They've got it here, on account of boarding stallion?

A. O, yes.

Q. I understood that to be an animal turned over to him by Mr. Toponce, while Mr. Toponce was acting for the company, was he?

304 A. He was working for the company.

Q. And acted for the company in this contract, didn't he?

A. It was not so admitted by the company.

Q. Isn't it a fact that what he did there, he wasn't pretending to be acting for himself, did he?

A. He was pretending to act upon his own responsibility for he said at the time that he would willingly take the animal.

Q. You didn't give him the animal, did you?

A. O, I don't know.

Q. You kept the animal and wanted to charge the expenses to him too?

No answer.

Q. How was that contract signed?

Mr. BENNETT: I object. The contract is here. Mr. Rogers has kindly consented to bring it up from his office.

Mr. KIMBALL: The fact is it was signed for the company.

Q. Now, coming down to Mr. Nichols' account, at the Deser-t National bank, and those checks—now as I understand it, the company sold bucks to Mr. Nichols.

A. Mr. Toponce sold bucks to Mr. Nichols.

Q. Well, now, wasn't you and Kerr and all of you present when

the bucks were sold and Toponce helped to load them down at the depot?

A. No; I was; Mr. Kerr was not.

Q. But he knew about this sale?

305 A. He knew about it afterward.

Q. Didn't he know of it at time it was made?

A. He was absent.

Q. Wasn't that a sale by the company?

A. That would be as the company would say—the board of directors.

Q. Well, the contract was drawn by you, wasn't it?

A. I believe it was.

Q. And on the part of the company, was it?

A. I don't remember how it is worded.

Q. And Mr. Nichols was to pay the money into the bank at certain intervals, to pay for those bucks?

A. I have forgotten.

Q. After that Mr. Toponce stopped deposits at Wells-Fargo's?

A. Yes, sir; he informed me he had.

Q. That was on account of the moneys being all deposited to the individual credit of Kerr, wasn't it?

A. Not to my knowledge.

Q. Isn't it a fact that that is the way the money was being deposited at Wells-Fargo's?

A. I don't know that it was.

Q. Mr. Toponce had it changed to the Deseret National bank afterwards?

A. Yes, sir.

Q. You say he informed you he drew checks on that account at the Deseret National bank—these checks offered in evidence?

A. Yes, sir.

306 Q. And these checks are in your handwriting, most of them, are they not?

A. I believe they are; all of them, I think.

Q. And you wrote the name of the Corinne Mill, Canal & Stock Co. on here?

A. I did.

Q. Here is a check to Ham. Jeppersen for $32, what was that given for, do you know?

A. No, I can't state what it was given for.

Q. Wasn't it for wages, or something of that kind, due him from the company?

A. Not to my knowledge; I don't know whether it was or not.

Q. Here's another one, H. Cohn & Co. for bill of tobacco, $127.36, signed Corinne Mill, Canal & Stock Co.—you made that signature, didn't you, and Toponce signed his name?

A. Yes, sir.

Q. No writing was ever done by Mr. Toponce except to sign his name?

A. No.

Q. Was that bill of tobacco you got from H. Cohn for the company?
A. Yes, sir. I suppose it was.
Q. For tobacco furnished to dip the sheep?
A. Yes, sir.
Q. And that was for the company, $127.36?
A. Yes, sir.

307 Q. Well, was this $32.00 check and this $127.36 included in the $888.00 you have charged to Mr. Toponce as money drawn from the Deseret bank?

A. Yes, sir.
Q. Here is one to T. B. Barnes in full of account, $34.38—that's drawn by you in the same way?
A. That was drawn by me in the same way.
Q. What was that account?
A. It was for labor performed by Mr. Barnes.
Q. For the company?
A. That is correct.
Q. That is included in the $888, too, is it?
A. Yes, sir; I'll explain that all those checks are charged to him.
Q. Here is one to N. P. Anderson, for services; that's drawn by you in the same way; was that. an account of the company with Mr. Anderson?
A. I have no knowledge that it was except from Mr. Toponce. Don't know that he performed the services or where he performed them.
Q. Mr. Toponce told you that it was for surveying the company's lands at the time?
A. Yes, sir.
Q. You have no reason to doubt it?
A. No, sir.
Q. Now, here's another one, Joseph Jenson, $85—that's drawn by you in the same way?
A. Yes, sir.
Q. That's a bill for what?
A. A bill for hay.

308 Q. That's for the company?

A. That he claimed was for the company. I don't know whether it was or not.
Q. That is included with all these checks in the $888 charged to Mr. Toponce's account?
A. The-'re all included, I believe; yes, sir.
Q. Is this $600 check in your handwriting or not?
A. Yes, sir.
Q. You drew that at the request of Mr. Toponce, and he signed it?
A. Yes, sir.
Q. What was that for, do you know?
A. I do not.
Q. Didn't Mr. Toponce tell you at the time?

A. I don't think that he did. He might.

Q. Didn't he tell you at the time this check was drawn that it was to pay Hall & Marshall for services in the case of Kerr against the Corinne Mill, Canal & Stock Co.?

A. I don't remember now that he ever told me that.

Q. When Mr. Toponce wanted to draw a check upon this or any other account he came to you and you filled up the body of the check and he signed it?

A. Yes, sir.

Q. And you're quite sure he didn't tell you that check was on the contract he had made with Hall & Marshall on the part of the company in the suit of John W. Kerr against the Corinne Mill, Canal & Stock Co.?

309 A. He may have done so.

Q. And this check for $2,463.76 was the balance in the bank and you drew that out in favor of the president?

A. Yes, sir.

Q. You signed that check yourself?

A. I signed that, as you will perceive. We didn't know at that time what the balance was, and that is the reason it is filled in by some one else. We filled the rest of it up. That was for the balance of the money.

Q. Who got that money, Mr. Fowler?

A. Mr. Kerr drew the money.

Q. On what account did he draw it?

A. On his private account. He was charged for it on his account.

Q. The check was drawn by you, and paid on Mr. Kerr's private account?

A. Yes, sir.

Q. No action of the board of directors on that, was there?

A. No, sir.

Q. Now, this $105.00 sold wool to G. W. Carlton, how did Mr. Carlton pay for that wool?

A. There is one item that Mr. Carlton puts in of $35.50 that he paid some one in Evanston. I don't remember the name now he claimed it was.

Q. Did you credit the $35.50 on the $105.00?

A. I always submitted such matters to Mr. Kerr and I
310 never done anything with them till he knew about them, and he told me he didn't admit any such account as that.

Q. Have you got the account on your books of G. W. Carlton? $105.

A. I think I have.

Q. Under what date?

A. It is under date of November 12th, 1886.

Q. Against G. W. Carlton?

A. Against G. W. Carlton.

Q. $105?

A. $105.

Q. Have you ever credited him with the $35?

A. I credited him $35.50 paid O. D. Marx, cash on account, it says $35.50. That's what he claimed for Marx.

Q. Wasn't that paid for keeping the horses of the company over in Wyoming?

A. I can't tell you. I don't know whether the horses were kept or not. I believe it was a claim made, and Mr. Toponce so told me; it was his team he left there when he went down. He went down there with the team, and was called back by telegram and left the team there.

Q. And you were sent the bill by Mr. Marx or Mr. Carlton for keeping those horses?

—. I first stated he returned that bill. But it doesn't appear he has ever——

Q. He has never paid the bill of $105?

A. No, sir.

Q. And you charged the wool to him in November, 1886?

311 A. November, '86.

Q. How does it come you charge that wool to Mr. Toponce?

A. I state the president said he didn't acknowledge the transaction.

Q. When did the president say he wouldn't do that; here last July, wasn't it?

A. I wouldn't be particular as to the date.

Q. It was July 16, 1888, when you charged that to Mr. Toponce, wouldn't it be?

A. I think it was. So it must have been about that time that the president objected to its being charged to Mr. Carlton.

Q. About that time Mr. Kerr made that objection to its being charged to Mr. Carlton and had it charged to Mr. Toponce, wasn't it?

A. That is the time he ordered me to charge it to Toponce. About that time he wanted to know how that stood, and so I told him.

Q. It was sold to Carlton?

A. He did so report it.

Q. Didn't Mr. Carlton afterwards pay that whole $105 by work for the company over at Hilliard, making dipping vats and one thing or another?

A. I believe he did make such a claim as that, yes, sir. He claimed he had furnished the company with wood and so forth, which Mr. Kerr denied.

Q. That Mr. Kerr denied?

A. Yes, sir.

312 Q. So the account is in dispute between Mr. Carlton and the company?

A. It is not. He holds Mr. Toponce responsible for his action in this matter.

Q. You have never paid Mr. Carlton for the wood and water?

A. Not that I know of. I don't know that we had any of them. I can't say as to that.

Q. You never tried to find out whether his account was correct for wood and water, did you?

A. Never have. Mr. Kerr told me he wouldn't recognize it, and that was the end of it.

Q. Mr. Toponce didn't get the wood and water, did he?

A. Now, sir, I can't tell you whether he did or not. I was not there.

Q. That's all the claims you have against Mr. Toponce, is it?

A. That's all we have up to that date, I believe.

Q. He hasn't been connected with the company since December, 1887?

A. He's a stockholder in the company. He has no official capacity.

Q. He has had nothing to do with the business of the company since, has he?

A. Not to my knowledge.

Mr. KIMBALL: Now, if your honor, please, I move to strike out all evidence as to the item of $15 paid on costs in case of
313 Luce against the company; for keeping a mare at his stable; another $15 item, and for the $123.75 paid by Kuhn and the $888.74 charged to him as money drawn out of the Deseret National bank, it is shown those payments were on the account of the company.

Mr. BENNETT: I think that is matter to go to the jury on.

The COURT: I am inclined to think the proper time to consider that is after the testimony is closed.

Mr. KIMBALL: As part of the cross-examination I offer in evidence checks No. 1, 2, 3, 4, 5, 6, drawn on the Deseret National bank.

Mr. BENNETT: No objection.

The COURT: They may be received.

Marked Defendant Ex. T, U, V, W, X, Y, P. E. K.

Mr. KIMBALL to the witness:

Q. Did you ever make an entry against Mr. Toponce of horse sold George A. Lowe?

A. I don't remember making an entry of that kind. If it isn't on the statement or on the books, I don't know.

Q. And one sold Tarpey?

A. I made an entry of a horse sold to Tarpey, yes, sir.

Q. That appears in your general account?

A. No, nothing against Toponce. I didn't charge it against Toponce.

314 Q. Was the account with the Deseret National bank opened by your order, or request, or with your consent as treasurer of the company?

A. No, sir.

Q. At the same time you had an account with Guthrie & Co.?

A. Yes, sir.

Q. And as treasurer of the company, you did your banking business with Guthrie & Co. and covering all that time?

A. What I done was with Guthrie.

Q. Of what did the company's business consist so far as the horses were concerned?

A. Breeding, selling of horses, and occasionally one was bought, I think. That was in the commencement, and afterward some selling and breeding.

Q. You didn't keep any race stock, breeding horses for racing purposes?

A. Not that I know of; no, sir.

Q How many men, all told, were employed with the band of horses, so far as you know, during the years from 1883 up to 1887, up to the time Toponce quit the business?

A. Well, I couldn't say as to that.

Q. Give the jury some notion about it.

A. I know Mr. Owsley was foreman on the ranch, and I don't know if there was any one else remained there strictly for that purpose or not. There have been several men employed and charged to ranch accounts. Of course I was not there to see what they done.

315 Q. Did the charge of the ranch involve the looking after the herd of horses?

A. Yes, sir.

Q. And I understand you to say that Mr. Owsley was in charge of the band of horses?

A. He was in charge of the ranch and horses.

Q. State whether or not, to your knowledge, the board of directors, or the president, or yourself, ever employed any person to break horses.

A. I don't know that we ever did; no, sir.

Q. Well, I'll ask you to state if you know whether for breaking horses for speed or for use as team horses, the company ever employed any service.

A. I don't think they did; no, sir.

Q. Do the books before you show an account between the company and Mr. Kerr; I mean a running account?

A. Yes, sir.

Recross-examination.

Examined by Mr. KIMBALL:

Q. At the time of the arrangement with Cheney Luce where was the contract made?

A. At the time the contract was written out it was in the office of the Corinne Mill Co.

Q. And who wrote the contract?

A. I wrote it.

Q. You was the secretary and treasurer of the company and a director at that time, were you not?

316 A. Yes, sir.

Q. You saw Mr. Luce when he took the horses away from Corinne under that contract, didn't you?

A. I can't say that I saw him take them away.

Q. Well, you know that he was there and that he did take them afterwards?

A. I did, evidently.

Q. Didn't you see him pass by the office with the horses when he started out of Corinne?

A. I don't think I did. If I did I paid no attention to it. It isn't a matter I would have been likely to have remembered.

Q. You made no objection to the contract at the time, did you?

A. No.

Q. Either as director, secretary or treasurer?

A. No, sir.

The COURT, to the witness:

Q. You spoke a few minutes ago about wanting to make some further explanation about that $888—why that was charged to Mr. Toponce.

A. Well, I think I have explained the theory of the checks there.

Q. When you were explaining the check, you said there was a further explanation you wished to make.

A. Well, it was this, that as soon as Mr. Kerr came to know of the fact of the money being deposited and the checks being
317 drawn he said he had no authority to do that, and he wouldn't recognize his autnority, and I was the only one who had authority.

Mr. KIMBALL, to the witness:

Q. Mr. Kerr told you to charge it to Toponce?

A. That was his order.

Mr. BENNETT: I offer in evidence judgment-roll in file No. 1343, case of John W. Kerr *vs.* Corinne Mill, Canal & Stock Co. It has been alluded to already. I desire to have all the facts out in connection with it and call attention now only to the stipulation between the attorneys for the two parties with the judgment entered in the action.

The COURT: What is the object?

Mr. BENNETT: To show further that Mr. Toponce recognized the claim of Mr. Kerr for interest and as bearing upon that point in testimony that he put in his services as an offset against Mr. Kerr's interest. We have shown in evidence his knowledge of the proposition and his action at the board, and now this admission of record in allowing judgment to be entered upon a stipulation including that interest.

Mr. KIMBALL: That's a stipulation between the company and Mr. Kerr, isn't it?

Mr. BENNETT: Yes.

The COURT: When was that stipulation made?

Mr. BENNETT: 24th day of February, 1888.

The COURT: When was that meeting held?

Mr. BENNETT: December 19, 1887, was when the meeting of the stockholders was held, when the minutes of that meeting were ratified.

318 The COURT: Was that when Mr. Toponce went out?

Mr. BENNETT: Yes.

The COURT: Mr. Toponce wasn't an officer at that time?

Mr. KIMBALL: Not at the time of this stipulation.

Mr. BENNETT: There was an answer filed in this suit, and at the time of the filing of the answer Mr. Toponce was vice-president. I think he verified the answer.

Mr. KIMBALL: I don't see the materiality or competency of this testimony. I object to it on that ground.

Mr. BENNETT: Judgment was entered March 1st.

The COURT: It seems to me doubtful as to whether it can have any force against Mr. Toponce. It was put in after he ceased to be an officer of the company in any way. I am inclined to sustain the objection.

Mr. BENNETT: Note an exception.

JAMES T. PITT, called for the defendant, being first duly sworn, testified as follows:

Examined by Mr. BENNETT:

Q. Mr. Pitt, do you know Mr. Toponce?

A. Yes, sir.

Q. And the Corinne Mill, Canal & Stock Co.?

A. Yes, sir.

Q. You are a stockholder in that company?

A. Yes, sir.

319 Q. State whether you were in charge of any part of the company's business, and, if so, for how long a time.

A. I'm in charge of the ranch.

Q. State what, if any, charge you had over a band of horses.

A. I had full charge of the horses.

Q. When did you take charge?

A. Twenty-fifth of January.

Q. State if, at or about that time, you made any count of the horses on the range bearing the company's brand.

A. I made a count about the 1st of April; between the 1st of April and the 1st of May.

Q. A complete count at that time?

A. To the best of my knowledge.

Q. In what year was that?

A. In last year—1888.

Q. State to the jury how many horses you found on there.

Mr. KIMBALL: I object as immaterial, incompetent and irrelevant.

The COURT: What is the object, Mr. Bennett?

Mr. BENNETT: Mr. Kimball, it was long after Mr. Toponce was out. Long after the count Mr. Fowler testified to.

The COURT: It was pretty soon after Mr. Toponce claimed to be acting for the company.

Mr. BENNETT: I call attention to the fact that Mr. Toponce,
320 or Owsley's report showed 240 some odd head on the range.

Now, I desire to show what the number was in April or May, when this count was had a few months afterward.

The COURT: Take the testimony.

Mr. KIMBALL: We except to the ruling of the court.

A. 137 head.

Q. Of what grade of animals?

—. ——.

Q. What was that 137 head made up of?

A. All ages. Just a stock bunch of horses, mares, colts, geldings, stallions.

Q. Have any more appeared since or have you found any more?

A. No, I haven't found any. I heard there were horses—some few.

Q. You went in charge of the ranch at what time, you say?

A. I think the 25th of January.

Q. Were any horses disposed of by you, or to your knowledge by any member of the company or by the company between the time you took charge and the time you made the count?

A. No horses were disposed of.

Q. Do you know whether during that time any died?

A. Yes, sir.

Q. How many?

—. Well, there were probably twenty head or somewhere along there died.

321 Q. Were you familiar with the ranch and the horses from the first of December until you took charge?

A. No, sir. I knew nothing of the horses till I took charge, that is, handling of them. I was well acquainted with them otherwise.

Cross-examination.

Examined by Mr. ROGERS:

Q. You say you were neither familiar with the ranch nor the horses before the time you took charge in January, 1888?

A. I mean in a working capacity. I had nothing to do with them. I was acquainted with the horses, and knew the ranch, very familiar, but I did not have charge.

Q. You didn't have anything to do with the horses or the ranch before?

A. No, sir.

Q. You say you found 137 head in January, 1888?

A. No, sir. I found more than that at that time.

Q. How many more than that did you find?

A. I found the dead ones.

Q. When was that you made this count?
A. In April.
Q. 1888?
A. Yes, sir.
Q. How many horses had the company alive then?
A. On the ranch at Corinne, 137 head, as near as I can count.

322 Q. Where did you keep those horses?
A. At Corinne, on the ranch, some of them; some of them we fed; the most of them out on the range.
Q. What proportion?
A. Well, about one-half of them.
Q. You have heard of more being found?
A. I heard there were, some place, but they've never been found.
Q. You think probably twenty of them died?
No answer.
Q. You say you think probably twenty of them died?
A. No, I didn't say that. I said about twenty while I had charge of them.
Q. Isn't it a fact that you rode the range with Lee Owsley in January, 1888, when he was showing you over the range, and you counted forty-nine dead ones at that time?
A. No, sir.
Q. How many did you count dead at that time?
A. About forty.

FRANCIS ROCHE, called for the defendant, being first duly sworn, testified as follows:

Examined by Mr. BENNETT:

Q. Where do you reside?
A. On my ranch south of Corinne.
Q. Do you know Mr. Toponce, the plaintiff here?
A. Yes, sir.
Q. And the Corinne Mill, Canal & Stock Co.?

323 A. Yes, sir.
Q. How long have you resided near Corinne?
A. About three years, this time. Formerly three years. I resided in Corinne from '76 to '79 and from '86 to the present time.
Q. What business are you engaged in?
A. At present I'm ranching.
Q. Cattle and horses?
A. Yes.
Q. Were you familiar with the services performed by Mr. Toponce in regard to the property of the company?
A. Generally. As much as one neighbor could observe another in his acts.
Q. For how long have you been familiar with the ranching business in this section of the country?
A. Well, for thirteen years.

Q. In your judgment, Doctor, what were the services worth which Mr. Toponce rendered during the time you knew him?

A. Well, I would expect to pay about $200 a year for such services—$200 a month, I mean.

Q. That's assuming that the service was well done; true and loyally rendered?

A. Certainly; I shouldn't pay him otherwise.

Cross-examination.

Examined by Mr. KIMBALL:

Q. You knew what Mr. Toponce's services were during that time?

324 A. Generally; I don't remember about the details, but I knew generally what he was doing.

Q. And from your own knowledge you say you would expect to pay about $200 a month?

A. Yes, I think so.

J. G. GREEN, called for the defendant, being first duly sworn, testified as follows:

Examined by Mr. BENNETT.

Q. Mr. Greene, where do you reside?

A. About thirteen miles north of Corinne, on my ranch.

Q. What is your business?

A. Farming.

Q. How long have you resided there?

A. Thirteen years.

Q. Do you know Mr. Toponce, the plaintiff?

A. Yes, sir.

Q. Have you ever been in the service of the company?

A. Yes, sir.

Q. How long—from what time to what time, as near as you can state?

A. Well, from the time they organized up to the present time, off and on, not continuously.

Q. Well, from the time of the organization of the company up to 1887 who has been in charge of the business?

A. Well, Mr. Toponce was so far as I know, a part of the time.

325 Q. In what service was he engaged in what part of the business, so far as you know?

A. Well, all I had to do with him, he would give me orders what to do so far as my work was concerned.

Q. What was your particular employment?

A. Principally keeping up the ditches.

Q. Was there anybody else had charge of that business to your knowledge?

A. Yes, sir.

A. Sometimes Mr. Spencer, and sometimes Mr. Kerr.

Cross-examination.

Examined by Mr. KIMBALL:

Q. How often did Mr. Kerr have anything to do with you and your work?
A. Well, he's had everything to do lately.
Q. Well, I mean while Toponce was working for the company?
A. The first time Mr. Kerr spoke to me was in August, 1885.
Q. Where was that?
A. In Corinne City.
Q. At what particular place?
A. At my ranch.
Q. Did Mr. Kerr make a practice of overseeing you and giving you orders?
A. No, sir.
Q. What did Mr. Spencer have to do with it?
326 A. Well, Mr. Spencer was miller and at times he would give some orders.
Q. Well, that was about mill ditches and mill-dams?
A. Yes.

JOHN W. KERR, called for the defendant, being first duly sworn, testified as follows:

Examined by Mr. BENNETT:

Q. Mr. Kerr, where do you now reside?
A. Well, my home is in Corinne, but I have been for about six and one-half months in Salt Lake under a doctor's care.
Q. Do you know Mr. Toponce, the plaintiff in this case?
A. Yes, sir.
Q. Are you in any way connected with the defendant, The Corinne Mill, Canal and Stock Co.?
A. I'm president of the company.
Q. And a stockholder?
A. Yes, sir.
Q. Do you know what the suit of Mr. Toponce against the company is brought for in a general way?
A. Brought for services and advances.
Q. State, Mr. Kerr, whether to your knowledge there was any agreement made between Mr. Topence and the company, the defendant, in regard to any pay for services to Mr. Topence in any part of the business of the company?
A. Never, sir.

327 Mr. KIMBALL: We object to that. We don't claim there was any express agreement between the company and Mr. Toponce.

The COURT: I understand this bears upon whether there was an express agreement upon the subject.

Mr. BENNETT: Mr. Toponce testified there was an agreement that Mr. Kerr should not charge for interest and he should not charge for services. I wish to negative that.

Mr. ROGERS: It may be proper as preliminary to that question.
The COURT: Go on.

Mr. BENNETT, to the witness:

Q. I ask you to state to the court and jury whether or not to your knowledge there was any agreement between the company and Mr. Toponce to the effect that he was not to charge for his services but you were not to charge interest on the purchase price of the sheep, was there or not any such agreement?

A. No, sir.

Q. When did you become president of the company?

A. At its organization. It went into effect, I believe, on the first day of January, 1883.

Q. And you have been president ever since?

A. Yes, sir.

Q. Where did you reside during the year 1883?

A. At Corinne. And up to last August, about the middle of August, I should think.

328 Q. State to the court and jury, whether as president you were ever connected with the business, and if so, in what capacity?

A. Well, I was there in charge of the business.

Mr. KIMBALL: I submit the by-laws show what the duties of the president were.

The COURT: He wants to show that he performed them as a matter of fact or that he went beyond them.

Mr. KIMBALL: I withdrew the objection.

Mr. BENNETT to the witness:

Q. State what duties were performed.

A. In the first place, I attended to the mill principally and the sheep, and Mr. Toponce attended to the ranch and the cattle.

Q. Was that upon an arrangement between you and Mr. Toponce—understanding or agreement?

A. Well, I don't know as there was any agreement about it, but I had been handling the sheep; I purchased the sheep in the first place in California and sold to the company. In the first place, he had a dislike to them.

Q. Who had charge of the finances of the company?

A. I attended to that pretty constantly myself.

Q. How long did you reside at Corinne?

A. Up till last August.

Q. State whether or not during all the time from January, 1883, up till last August you were in charge of the finances of the company, and doing what you say you did in regard to the company's business.

329 A. Yes, sir; and up to the present time.

Cross-examination.

Examined by Mr. KIMBALL:

Q. What, if anything, did Mr. Toponce have to do with the sheep up to the time he left the company?

A. Well, the sheep that was down on the ranch he attended to sometimes. Our sheep was divided; up in Wyoming, and in Utah.

Q. Did he have anything to do with either part of the sheep?

A. Well, not in particular. He tended to the sheep sometimes and shearing and dipping in Wyoming.

Q. And so he went over there every shearing time in Wyoming?

A. Yes, sir.

Q. And seen to the dipping of the sheep over there?

A. Yes, sir.

Q. How long have you known Mr. Toponce?

A. About twenty-four or twenty-five years.

Q. You and he were in business together a good many years before this company was organized, were you not?

A. No, sir; he used to work for our company, you know.

Q. Well, he was in your employ?

A. Yes.

Q. You have known him upwards of twenty years?

A. Yes, sir.

330 Redirect examination.

Examined by Mr. BENNETT:

Q. Have you received or charged anything for your services?

Mr. KIMBALL: We object; immaterial.

The COURT: He has testified he rendered services for the company.

Mr. KIMBALL: But it's not material in this case whether he has received pay or charged for his services.

The COURT: I think it bears upon the question whether the two incorporators here intended to charge for their services.

Mr. KIMBALL: It isn't a question of what they intended to do.

The COURT: It's a question of what Mr. Toponce intended to do. If the other incorporator was working there it might bear upon the question as to whether he intended to charge for it. You may take the testimony.

Mr. KIMBALL: Note an exception.

A. No, sir.

Mr. BENNETT to the witness:

Q. You say the company first incorporated in January, '83?

A. Yes, sir.

Q. State whether at or about that time, or before the in-
331 corporation and Mr. Toponce had any understanding or agreement in regard to your services and his services.

A. When I went into the company or before I went into the company we was in business in Corinne, and he wanted me to buy one-half interest in the mill and ditch and then turn it into a company—a stock company. He had a great deal of money on it and wanted to get me to lift him out.

Q. You did so?

A. I bought one-half of the property, and then we put it into a joint stock company.

Q. At that time did you have any agreement in which you and he would render services?

Mr. KIMBALL: I object; immaterial and incompetent.

The COURT: You mean an agreement between him and Toponce?

Mr. BENNETT: Yes.

The COURT: I think that's proper.

Mr. KIMBALL: I object, a time anterior—immaterial.

The COURT: The objection may be overruled.

Mr. KIMBALL: We except to the ruling.

A. I think it was on the 18th of December he took me out riding at Corinne and wanted me to make him a proposition for to lift an indebtedness of between $14,000 and $15,000 he owed to Mr. Dooley.

332 He wanted to know how much I would give for one-half interest on the property and put it into a joint stock company, this incorporation. I made him a written proposition, what I would do. What I would give for the property. He told me what his property was, and we was both to put in our services and run it, just as we had been before. I furnished the money and he run the mill and the canal. So, on the day of the incorporation I gave him a check for between fourteen and fifteen thousand dollars and lifted his note to Dooley.

Q. Then it was arranged between you and he that your services should go in free of charge?

A. Yes, sir.

Q. That you say was on or about the 18th day of December?

A. Yes, sir.

Q. 1882?

A. Yes, sir.

Recross-examination.

Examined by Mr. KIMBALL:

Q. You say this agreement was in writing—or your proposition?

A. My proposition was in writing. He accepted in writing.

Q. Where are those papers?

A. I think Mr. Bennett has it.

Mr. KIMBALL: We submit that should be stricken out. The agreement was in writing.

Mr. BENNETT: I'll furnish the proposition.

The COURT: I thought he referred to a proposition for the sale of the sheep.

333 Mr. KIMBALL: No, sir; he referred to a time anterior to this incorporation.

The COURT: He has given testimony now tending to show a preliminary oral talk between them.

Mr. KIMBALL: They reduced it to writing.

The COURT: I don't think it should be stricken out till the writing is produced.

Mr. BENNETT: Mr. Kerr has stated that the writing only referred to the transfer of the property.

Mr. ROGERS: We object to the contents of the writing being stated till the writing is accounted for.

The COURT: He says it will be submitted.

Mr. KIMBALL to the witness:

Q. You say that conversation you had with him in Corinne was in 1882?

A. Yes, sir.

Q. Wasn't that at the time you made the proposition to sell the sheep to the company that that proposition took place?

A. That was in between January and February. That was in writing, too.

Q. Wasn't it just about that time that you were talking about the purchase of the sheep that that talk was had about his not charging for his services?

A. No, sir; there never was a word said after that.

Q. At the time you were talking to him about selling the sheep to the company, didn't he tell you that you were putting them in at $80,000, that he would render his services to the company as against the interest on that note?

334 A. Never, sir.

Q. He never told you that?

A. He never told me that.

Q. This time you speak of was in 1882?

A. Yes, sir.

Q. And that was the only time he ever spoke to you about it?

A. That's the only time he ever spoke to me about salary.

Q. How much did you pay for a half interest in the property?

A. I paid him $10,000.

Q. What was the property at the time you purchased a half interest in?

A. The mill and water power.

Q. Anything else?

A. Well, well, everything that was owned there.

Q. A half interest in the mill and water right?

A. Yes, sir.

Q. Water power?

A. Yes, sir.

The COURT to the witness:

Q. Do I understand you to say that the proposition that Mr. Toponce made to you was put in writing, or that you made him a proposition?

A. I made him a proposition for a half interest, how much I would give.

Mr. KIMBALL to the witness:

Q. How much of the stock of the company do you now own?

335 Mr. BENNETT: I object; immaterial.

The COURT: What is the object?

Mr. KIMBALL: I ask in view of this proposition. I wish to offer this proposition in evidence.

The COURT: It may be received.

Marked Plaintiff Ex. Z, P. E. K.

Q. That is the proposition you made him?

A. Yes, sir. That's right.

Mr. Kimball reads as follows:

CORINNE, *December 18th*, 1882.

Mr. Alex. Toponce:

I will give you ten thousand ($10,000) dollars for the one-half undivided interest in your mill, ditch and your interest in the ranch property—then mill, ditches and ranch properties thrown together, with all privileges and advantages thereto belonging. Stock the same, you having one-half of the stock of shares and I the other half—you selling your horses, cattle and farming implements such as may be beneficial to said company; and I to do the same with my horses at the same rate—the price of said live stock to be reasonable.

Respectfully, JOHN W. KERR.

Accepted:

A. TOPONCE.

Redirect examination.

Examined by Mr. BENNETT:

Q. State what that paper which I hand you is.

336 A. That is a check for $14,672.50, dated January 1, 1883, Wells, Fargo & Co., pay to J. E. Dooley for A. Toponce note, $10,310 and interest $1,362.50, or order, $14,672.50, signed John W. Kerr.

Q. State whether that is money embraced within the proposition just now shown you.

A. Yes, sir.

Q. The balance between the thirteen thousand odd and the 10,000 was charged to him on the books of the company as money advanced to him?

A. Yes.

Mr. BENNETT: I offer that check in evidence in connection with the proposition.

The COURT: It may be received.

Marked Defendant's Ex. 35, P. E. K.

Mr. BENNETT: I'll state that John W. Kerr & Co. means John W. Kerr.

WITNESS: It means me since I bought out Durkee.

Mr. KIMBALL: The Corinne Mill, Canal & Stock Co. means John W. Kerr, too, don't it?

A. No, sir.

Mr. BENNETT: I will read this contract between A. Toponce and Cheney Luce and allow the reporter to put it in the record. "This memorandum of agreement between A. Toponce and Cheney Luce witnesseth that the said Cheney Luce takes a dark bay filly belonging to the C. M., C. & S. Co., branded T. on the left shoulder, and a little white on the left hind foot, on the following terms: the said Luce to keep, doctor, take care of and break for the term of
337 seventy-five days, and at the expiration of said time, said Luce shall own one undivided half interest in the said filly above described."

Witness our hands this 27th day of October, 1887.

A. TOPONCE,
General Manager C. M., C. & S. Company.
CHENEY LUCE.

C. P. GROOT, *Witness to.*

Marked Defendant's Ex. 36, P. E. K.

JOHN K. FOWLER recalled for defendant.

Examined by Mr. BENNETT:

Q. You stated this morning that on the books of the company was an open, current account with John W. Kerr?

A. Yes, sir.

Q. Does the account appear in more than one book?

A. Yes, sir.

Q. I will thank you to designate them.

A. Ledgers A, B and C, and journals A, B, C and D, and during a portion of 1883 day-books A and B.

Q. Have you any copy of that account taken off in manuscript?

A. No, sir.

Q. How long would it take up to furnish one?

A. The whole account, from '83 through?

Q. Yes.

A. It would take me some time. I can't hardly state how long it would take.

Q. Turn to the first ledger account in 1883. Does your
338 ledger, now open before you, show a balance monthly in Mr. Kerr's account?

A. Yes, sir. I think it does, generally.

Q. Is that a correct writing of his account as transferred from your books of original entry?

A. Yes, sir.

Q. State the balances shown upon your ledger now held in your hand month for month for the whole time covered by the ledger account.

The COURT: What is the object of this?

Mr. BENNETT: To show that Mr. Kerr served the company not only by labor but in advancing moneys for the business.

WITNESS: January, 1883, balance was $10 to his credit. February 27, 1883, $8,593.12.

Q. To Kerr's credit?

A. Yes, sir. March, 1883, $8,514.54.

The COURT: That is a balance in his favor.

A. Yes. April, 1883, $16,083.94; May, 1883, $25,014.50; June, 1883, $31,415.25; July, 1883, $32,332.28; August, 1883, $49,660.72; September, 1883, $45,757.72; October, 1883, $34,336.69. The November balance is rubbed out here. It's about $40,000.00—more than that.

Q. State approximately.

A. Well, it would be about $38,300.00 as near as I can get at it. December, 1883, $46,497.65; January, 1884, $51,485.37; February, 1884, $62,003.57; March, 1884, $53,300.47; April, 1884,
339 $52,492.52; May, 1884, $53,601.41; June, 1884, $54,583.95; July, 1884, $54,558.34; August, 1884, $51,542.89; September, 1884, $43,061.76; October, 1884, $4,127.77; November, 1884, $44,697.16; December, 1884, $45,227.81; January, 1885, $45,857.94; February, 1885, $46,210.42; March, 1885, $48,851.56; April, 1885, $53,061.45; May, 1885, $51,320.24; June, 1885, $51,847.80; July, 1885, $48,334.59; August, 1885, $48,124.68; September, 1885, $40,477.45; October, 1885, $42,593.23; November, 1885, $44,030.13; December, 1885, $29,715.55; January, 1886, $30,258.25; February, 1886, $34,727.30; March, 1886, $31,610.27; April, 1886, $31,779.43; May, 1886, $31,915.22; June, 1886, $25,014.73; July, 1886, $34,700.43; August, 1886, $35,348.46; September, 1886, $37,218.82; October, 1886, $28,477.22; November, 1886, $40,777.07; December, 1886, $51,151.31; January, 1887, $51,661.56; February, 1887, $52,899.94; March, 1887, $54,877.21; April, 1887, $56,366.05; May, 1887, $55,752.79; June, 1887, $21,091.15; July, 1887, $57,092.51; August, 1887, same amount; September, same; October, 1887, $45,950.41; November, 1887, $46,697.74; December, 1887, $54,392.11.

Q. I will now ask you generally to state, if you know, what items make up these credits through 1883, 1884, 1885, 1886 and 1887—what are the character of the items?

A. It is for moneys advanced to the company and for interest.

Mr. BENNETT: I offer those books in evidence for the purpose of showing the account.

340 The COURT: They may be received.

Mr. KIMBALL, to the witness:

Q. What were the balances after December, 1887?
A. January, 1888, $52,091.35; February, 1888, $24,646.03.
Q. What reduced that amount in February?

Mr. BENNETT: I object; immaterial.
The COURT: What is the object?
Mr. KIMBALL: I want to show the accuracy of the books, and then there was a judgment taken here in March, and I want to see what amount has been paid on it.
The COURT: That wouldn't be material here.
Mr. KIMBALL: We are entitled to the whole account.
The COURT: You are during the time that it is material, but how is it material after Mr. Toponce left?
Mr. KIMBALL: If a part of this account has been paid it is very material upon the question of services in furnishing money.
The COURT: If it had been paid during the time this balance was stated.
Mr. KIMBALL: We think it is as material as any part of the account.
The COURT: It wasn't offered for the purpose of establishing a claim against the company on Mr. Kerr's part. That would be immaterial.
Mr. KIMBALL: It shows that his services have been paid for.
341 The COURT: It will be taken that the claim against the company was perfectly good, and if it wasn't paid it would be expected to be paid, so that I don't see that payments after the time Mr. Toponce left is material.
Mr. KIMBALL: Note an exception to the ruling.

Defendant rests.

JAMES T. PITT recalled for cross-examination.

Examined by Mr. KIMBALL:

Q. Who counted out the horses to you at the time you took charge of the ranch?
A. Lee Owsley tried to count them out.
Q. Well, at the time you say you took charge of the horses, was not a part of the horses up in Wyoming?
A. Yes; there was a few head of horses up with the sheep outfit in Wyoming.
Q. How many head?
A. I don't know just how many head.

Mr. KIMBALL: I move to strike out those items I called attention to at the close of Mr. Fowler's testimony.
The COURT: What are they?
Mr. KIMBALL: That item of $15 costs paid in case of Cheney Luce; item $15, paid for keeping mares, and an item of $123.75, to Cheney Luce for breaking stallion Aleck, and $888.74 taken from

the Deseret National *National* bank, the testimony shows they were all paid on the part of the company—business of the company. There is no evidence to go to the jury on that.

342 The COURT: Calling attention to the first one, Kerr paid costs in suit, Luce *vs.* The Company, now, from the testimony, that seems to have been changed to Mr. Toponce on the books of the company. Now, that was a suit brought against the company on a contract that Mr. Toponce assumed to make without authority, you claim, Mr. Bennett?

Mr. BENNETT: Yes.

The COURT: Now it seems to me there is no showing here that will entitle the company to make a claim of that kind against him. I hardly think the testimony here shows such a case as would entitle the company to make such a charge against Mr. Toponce. It was entered after Mr. Toponce left the company and there is not such a showing here as imports knowledge to Mr. Toponce and as would charge him with it.

In the second item, board of mare to Ogden.

Mr. KIMBALL: That's the same case.

The COURT: It would seem from the testimony here that Mr. Toponce made some kind of an arrangement about the mare by which it came here and this $15.00, I judge from the entry here, they charged it to the company. I don't think the testimony tends to make such a showing as to charge that item to Mr. Toponce.

Now, there are two others, one paid to Luce—and in relation to that, they don't claim it is an improper charge, they claim it is money paid to Kuhn upon a matter that Mr. Toponce, they

343 claim, had made an improper bargain in relation to, and that is just so with the cash drawn from the Deseret National bank. It is true they have shown he drew checks upon the account, but it is also shown that it was used for corporation purposes—the testimony tends to show that. And the $103.00 charged for the wool sold Carlton. I think the $123.75 and the two $15.00 should be withdrawn from the jury because there is no testimony tending to show that they are proper charge against him and there is no testimony tending to show that he examined the account or that it was such a length of time before he went out as to lead to the inference that he knew.

As to the $888.74, the testimony tends to show Mr. Toponce did draw that corporate money from the corporate account. The charge they make is for the money in his hands, but I think they should be submitted to the jury with the statement that if it was paid out for corporate purposes, that then it would not be a proper charge, but the question whether he expended it for corporate purposes is a question of fact for the jury.

Mr. BENNETT: We except to the ruling of the court.

ALEXANDER TOPONCE recalled in rebuttal.

Examined by Mr. KIMBALL:

Q. Mr. Toponce, for what was check No. 2, dated October 29, 1887,

drawn on the Deseret National bank, payable to Hall & Marshall or order, for $600, paid?

A. To manage the suit against the Corinne Mill, Canal & Stock Co.

344 Q. What suit?

A. This suit of John W. Kerr against the company.

Q. Who are Hall & Marshall?

A. Attorneys at Salt Lake City.

Q. The $600 is attorneys' fees paid in that suit?

A. Yes, sir.

Q. Of Kerr against the Corinne Mill, Canal & Stock Co.?

A. Yes, sir.

Q. Mr. Toponce, you heard Mr. Kerr's testimony as to the agreement made between you and him, in 1882, in December, with reference to the sale of property to him, or a half interest in it. What, if anything, was said in the negotiating that sale about you and he rendering services to the stock company when it should be formed without pay?

A. There was nothing said at that time.

Q. When, if at all, did you have a conversation with reference to that subject?

A. When we were negotiating about the sheep.

Q. That was after the organization of the company?

A. Yes, sir.

Q. That's the same conversation you testified the other day about your services going against the interest on his note for the sheep?

A. Not on no note. On an account for $71,000. I never knew the note was in existence.

345 Cross-examination waived.

LEE OWSLEY, recalled for plaintiff, in rebuttal.

Examined by Mr. KIMBALL:

Q. You are acquainted with Jim Pitt, are you?

A. Yes, sir.

Q. I'll ask you to state what, if anything, you did toward counting out the horses to him when he took charge of the ranch.

A. Well, when he took charge of the stock in January. That was about the 1st of January he took charge of the stock, but I counted out the stock to him at his request about the 1st of April.

Q. How many did you count then?

A. I counted out 165.

Q. Company horses?

A. Yes, sir.

Q. How many horses were in Wyoming at that time, if you know?

A. I couldn't state the exact number. There was fifteen or eighteen head—somewhere along there.

Q. Did you ride the range with Jim Pitt at any time looking for stock?

A. Yes, sir.

Q. What, if anything, did you know about horses being dead—died during the winter?

A. There was a great many horses died in the field there.

Q. Did you count them?

346 A. There was about twenty-four or twenty-five head. I didn't tally them up.

Q. About twenty-four or twenty-five head?

A. Yes, sir.

Q. When was that you counted the dead horses?

A. In the last of January or the first of February.

Q. Were you still in the employ of the company at that time?

A. Well, no, sir. The 25th of January I went out of their employ.

Cross-examination waived.

Redirect examination.

Examined by Mr. KIMBALL:

Q. Where were these horses at the time you counted them?

A. In the big field just west and south of Corinne.

Q. How far from Corinne?

A. I guess between a quarter and a half mile from town.

Mr. KIMBALL: I desire to amend the second count of the complaint in this respect. It is charged there as feed and grain furnished, and I desire to amend it to correspond to the proof, for feeding and keeping the stock.

Mr. BENNETT: I object to that generally at this stage of the case.

The COURT: You may make such alteration in the proof as you think conforms to the proof as you claim it to be. I wish

347 you would formulate your amendment and state it to the stenographer and have it put in the record in case that question may come up hereafter.

Mr. KIMBALL: Plaintiff moves leave to amend the complaint by striking out from page two, line fifteen, the words, "feed, hay and grain furnished and fed to," and to insert in lieu thereof "feeding, caring for and keeping."

Mr. BENNETT: I object that that is changing the cause of action entirely.

The COURT: You don't claim that it would change the character of proof in any way required.

Mr. BENNETT: I make the objection as a matter of practice, that it changes the cause of action.

The COURT: I think I ought to let the amendment be made?

Mr. BENNETT: Note an exception.

Plaintiff rests.

Mr. KIMBALL: We agree that the answer as it now stands shall be considered a denial of that cause of action.

J. K. FOWLER, recalled for defendant in rebuttal.

Examined by Mr. BENNETT:

Q. Mr. Fowler, have you in the books of the company accounts with the ranch and with the sheep herd?

A. Yes, sir.

Q. I will ask you to produce all the accounts, and call
348 your attention to the ledger account in that respect. Mr. Fowler, from the books, I will ask you to state to the court and jury what the profits of the ranch were during 1883, 1884, 1885, 1886 and 1887 as shown by the books of the company.

Mr. KIMBALL: We object to that.

The COURT: Mr. Bennett, what is the object?

Mr. BENNETT: On the question of management, Mr. Toponce, I think, has stated he was in charge of the ranch and Mr. Kerr of the sheep, except a few sheep that were on the home ranch from time to time.

The COURT: Well, do you think that his services, if he be entitled to any, would be governed by that?

Mr. BENNETT: I think that would be one thing entering into the value of the services.

The COURT: It seems to me it can hardly depend upon whether the profits were large or small. Of course, any mismanagement done there would be proper but to show the bare, single fact that profit and loss account one way or the other, I am inclined to think is a subject of inquiry that wouldn't bear upon the question. I am inclined to sustain the objection.

Mr. BENNET-: We except to the ruling.

Mr. BENNETT to the witness:

Q. I will ask you to state from the books of the company, Mr. Fowler, during the years '83, '84, '85, '86, and up to December, '87, whether profits were made from the sheep, and if so, how much?

Mr. KIMBALL: I object upon the same ground—immaterial.
349 The COURT: The objection is sustained.
Mr. BENNETT: I except to the ruling.

GEORGE J. MARSH, called.

Examined by Mr. BENNETT:

Q. Mr. Marsh, I will thank you to state—explain to the court and jury, the item of costs to which your attention was called by Mr. Kimball, and state what the case was.

A. No. 548.

Q. Say how much costs you received.

A. I received at one time $69.40. That was at the time of the continuance. And the balance of the costs was paid by Mr. Bennett in this case, $172.85.

Mr. KIMBALL: That was paid by Mr. Bennett?

A. Yes, sir.

Q. What date was it you received that $69?
A. On the 12th day of May, 1887.
Q. $69.85?
A. $69.90.
Q. Didn't you at one time receive $287.20 on that same account?
A. As costs?
Q. Yes.
A. I don't recollect it. If I did it is on the cost bills.
Q. It is charged here as paid, $27.20.
A. As costs in the case?
Q. Yes.
350 A. I'll say the $29.90 and the $172.95 was all the costs we ever paid out.

Mr. KIMBALL: I am satisfied that $172 is in there by mistake. I will deduct it from the amount of the first cause of action.

Defendant rests.

OGDEN, UTAH, *April* 25, 1889.

I, P. E. Keeler, official reporter *pro tem.*, of the first judicial district court of Utah Territory, hereby certify that the foregoing is a true and correct transcript of the testimony and proceedings in the above-entitled case.

P. E. KEELER,
Official Reporter pro Tem.

PLAINTIFF'S EXHIBITS.

EXHIBIT A.

Kimball has: Owsley board account.

EXHIBIT B.

Kimball has: Page 1 of Owsley's account book.

EXHIBIT C.

In the first district court, Corinne Mill, Canal Co. *vs.* Mr. Johnston. No. 865.

Corinne Mill, Canal Company to C. S. Varian, Dr., 1886. December 24, to professional services in above action, $250; to cash paid clerk, $5. December 23, by cash (Toponce) $220; balance, due $35. Received payment.

351 EXHIBIT D.

Received from A. Toponce thirty dollars, account of defendant in case entited "Duchenean *vs.* C. M., C. & S. Co. *et alo.*," in first district court. This receipt is a duplicate.

DICKSON & VARIAN.

EXHIBIT E.

Received from A. Toponce $50.00 on account of Corinne Mill, Canal & Stock Company in case entitled "C. M., C. & S. Co. *vs.* Johnson" in first district court. This receipt is a duplicate.

DICKSON & VARIAN.

EXHIBIT F.

Corinne Mill, Canal & Stock Company *vs.* Wm. Johnston.

No. 646. Corinne Mill, Canal and Stock Company to C. S. Varian, Dr., 1886. December 18, to professional services in above cause, $100. December 18, by cash, (Topence) $70. Balance due, $30. Received payment.

EXHIBIT G.

Received from A. Topence $100 on account, fee in four suits against Duchenean & House in supreme court, Territory of Utah.

C. S. VARIAN.

EXHIBIT H.

No. 48. CORINNE, *January* 11, 1888.

Received of C. M., C. & S. Co., $9.67. Paid by A. Toponce, amount of bill for oats, $9.67.

F. H. CHURCH.

352 EXHIBIT I.

$13.65. CORINNE, *January* 13, 1888.

Received of J. W. Guthrie, $13.65, for account of A. Toponce, for corn.

WILLIAM HADLEY.

EXHIBIT J.

C. M., C. & S. Co., to C. C. Loveland, Dr.

To sheriff's fees and allowance for taking care of stock in the case *vs.* Wm. Johnston in attachment. Full amount agreed upon, $986.50. August, 1886, received of A. Toponce, cash, $699.00. June, 1887, of C. M., C. & S. Co. in horses (two horses), $287.50. Received payment in full, $986.50.

C. C. LOVELAND.

EXHIBIT K.

$156.50. OGDEN, UTAH, *January* 4, 1886.

Received from A. Topence $156.50, costs in cases of Corinne Mill, Canal & Stock Company *vs.* William Johnston, known as Nos. 548 and 646, first district court.

J. N. KIMBALL.

EXHIBIT L.

$25. OGDEN, UTAH, *April* 19, 1886.

Received of Corinne Mill, Canal & Stock Company $25, to be applied on costs in case *vs.* Wm. Johnston.

J. N. KIMBALL.

EXHIBIT M.

$125. OGDEN, UTAH, *October* 4, 1886.

In the first district court, Corinne Mill, Canal & Stock Company *vs.* Wm. Johnston.

Received of A. Toponce $125, for record in above case for the supreme court.

JAMES N. KIMBALL.

353 EXHIBIT N.

$50.00. OGDEN, UTAH, *December* 24, 1885.

Received by me — Corinne Mill, Canal and Stock Co. fifty dollars on account of fees in its various cases now pending in the first district court—received some by the hands of Alexander Toponce.

JAMES N. KIMBALL.

EXHIBIT O.

$400.00. OGDEN, UTAH, *July* 9, 1886.

Received of Corinne Mill, Canal and Stock Co. by the hands of Alexander Toponce four hundred dollars, which leaves a balance due me of $5.00 to January 1, 1887.

JAMES N. KIMBALL.

EXHIBIT P.

CORINNE, *December* 29, 1887.

Due M. D. Cox, on account of labor by J. Cox, $3.15; account of labor by self, $10.00. Total, $13.15.

J. K. FOWLER,
Sec'y C. M., C. & S. Co.

F. H. Church: We will accept the above due bill as cash on account of judgment against James Allen.

J. K. FOWLER,
Sec'y C. M., C. & S. Co.

Endorsed: C. M., C. & S. Co. *vs.* James Allen.

Received the within bill as cash of constable and paid same to A. Toponce as cash on judgment.

F. H. CHURCH, *J. P.*

354 EXHIBIT Q.

Articles of Incorporation of the Corinne Mill, Canal & Stock Company.

UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } ss:
County of Box Elder, }

The undersigned, whose full names and places of residence are:
Alexander Toponce, of Corinne, Box Elder county, Utah.
John W. Kerr, of Salt Lake City and county, Utah.
Derastus H. Spencer, of Corinne, Box Elder county, Utah.
John K. Fowler, of Corinne, Box Elder county, Utah.
Ira H. Fowler, of Corinne, Box Elder county, Utah.

For the purpose of forming a corporation under chapter IV of title XI, of the Compiled Laws of Utah entitled "Of corporations for general purposes," and acts amendatory thereof and supplementary thereto, do hereby associate and agree as follows:

Article I. The name of this corporation hereby formed shall be Corinne Mill, Canal & Stock Company, and said corporation is organized at Corinne, in the county of Box Elder, in the Territory of Utah.

355 Article II. The corporation shall exist fifty years, unless sooner dissolved, according to law.

Article III. The business and pursuit of the corporation shall be to take up, appropriate, purchase, use and sell water, water rights, water appropriations and powers, to buy, construct, operate, use and sell water flumes, canals, ditches, and other water-ways; to buy, improve, add water privileges to and sell agricultural and other lands; to use, sell and lease water for irrigation, mining, milling, manufacturing, stock and agricultural purposes; to transport by waterways and other means, logs, lumber, timber, merchandise and agricultural products; to buy, manufacture and sell flour, lumber, merchandise, logs and agricultural products, including live stock; to construct, buy, operate and sell mills, mines, ranches, manufactories, water powers, canals and ditches, and real estate connected therewith, to establish and carry on a general merchandising business and generally to buy, use and sell all kinds of property connected with or incident to the conduct of all such business. Also to loan any moneys of the company on real or personal securities; the business hereby authorized and contemplated may be carried on at any place or places in the United States and territories.

Article IV. The principal place of business and general office of the corporation shall be at Corinne, Box Elder county, Utah, but financial, transfer and registry office may be established at any place or places in the United States and territories.

356 Article V. The amount of capital stock of the corporation shall be six hundred thousand dollars, divided into one hundred and twenty thousand shares of the denomination of five (5) dollars each.

Article VI. The amount of capital stock subscribed by the corporators, parties hereto, is as follows:

Alexander Toponce, 50,000 shares, $250,000.
John W. Kerr, 50,000 shares, $250,000.
Derastus H. Spencer, 5 shares, $25.00.
John K. Fowler, 6 shares, $30.00.
Ira H. Fowler, 5 shares, $25.00.
John W. Kerr, trustee, 19,984 shares, $99,920.
Total, 120,000, $600,000.

Article VII. The officers of the corporation shall be: A board of directors of not less than three (3) nor more than nine (9) members, a president, vice-president, treasurer and secretary.

The president, vice-president and treasurer shall be directors, and to be eligible to any office, except secretary, a person must be owner in his own right, as shown by the books of the corporation, of not less than five (5) shares of capital stock. Any officer of the company may be removed for cause after a hearing by the board of directors by a majority vote of the board.

Article VIII. There shall be a meeting of stockholders for the election of officers on the 3rd Monday of December, 1883, and annually thereafter, but the time of holding annual meetings may be changed at any annual meeting of the stockholders.

357 Article IX. The term of all officers, except when a vacancy is filled and except as provided in section ten (10) shall be one (1) year, and until successors are elected and qualified.

Article X. Until the first annual meeting of the stockholders and the election and qualification of officers the following-named persons shall be directors, to wit:

John W. Kerr, Alexander Toponce, Derastus H. Spencer, John K. Fowler and Ira H. Fowler, and the said John W. Kerr shall be president, Alexander Toponce, vice-president, John K. Fowler, treasurer, and John K. Fowler, secretary.

Article XI. The board of directors may fill vacancies in the board or any of the offices of the corporation until the next annual meeting.

Article XII. The private property of the stockholders shall not be liable for the debts or liabilities of the corporation.

Article XIII. The associates hereto and said corporation propose to purchase, hold and operate the following mining property, to wit:

A water ditch or canal extending from the Malad river to Corinne, Utah; a flouring mill, Corinne mills, situated on the same, said ditch or canal, being about nine (9) miles long; a water ditch or canal, extending from Salt springs intersecting and entering into said Malad and Corinne ditch; a ranch situated about 22 miles north of Corinne on the north bank of the said Malad river

358 and now owned by Alexander Topence and John W. Kerr, together with the rights, privileges and easements belonging or incidental thereto, and to pay the said Topence and Kerr and their nominees 120,000 shares of the full-paid capital stock of said company in full payment therefor, and the said Alexander To-

pence and John W. Kerr, subscribers hereto, agree to sell their several interests in said property to said company for said 120,000 shares of full-paid capital stock to be issued to the subscribers hereto, to each the amount severally subscribed by him, and they hereby agree that they hold the title to said several interests in said property in trust to convey the same as aforesaid upon the issue and delivery of said stock. And they hereby direct that said stock be issued to the subscribers hereto, to each the amount by him subscribed. And it is further agreed that the 19,984 shares subscribed for by John W. Kerr, trustee, shall be issued to him, and that he shall secure and hold the same, and the proceeds derived therefrom, as an expense and working fund and capital, and that as president of the company he may sell, transfer, or otherwise dispose of the same or any part thereof in such manner, on such terms, and for such uses as he in his discretion may think beneficial to the company.

For the purposes of buying other properties and carrying on the business of the company, the company may issue bonds or notes, secured by mortgage, or deed of trust of its properties or any part thereof.

359 Article XIV. The board of directors may make by-laws for the regulation and government of the business and affairs of the corporation.

Article XV. The board of directors, for the purpose of paying debts and expenses, and carrying on the business of the corporation, may levy and collect assessments on the full-paid capital stock of the corporation, and provide for the sale and transfer of the stock for non-payment, in such manner as may be provided in the by-laws of the corporation.

Witness our hands and seals the first day of January, 1883.

JOHN W. KERR. [SEAL.]
ALEXANDER TOPONCE. [SEAL.]
JOHN K. FOWLER. [SEAL.]
DERASTUS H. SPENCER. [SEAL.]
IRA H. FOWLER. [SEAL.]

In presence of—

L. C. LEE.
F. S. LEE.

TERRITORY OF UTAH, }
Box Elder County, } ss:

John W. Kerr, Alexander Toponce, John K. Fowler and Derastus H. Spencer, being each duly sworn, doth each for himself depose and say: I am one of the subscribers to the foregoing agreement of incorporation of the Corinne Mill, Canal & Stock Company; it is *bona fide* my intent, and the intent of the subscribers to said agreement, to commence and carry on the business mentioned in said

agreement, and I verily believe that each subscriber and
360 party to the said agreement is able to pay, and will pay the amount of his stock subscribed.

JOHN W. KERR.
ALEXANDER TOPONCE.
JOHN K. FOWLER.
D. H. SPENCER.

Subscribed and sworn to before me.

JOHN D. BURT,
Probate Judge, Box Elder Co., Utah Territory.

TERRITORY OF UTAH, }
Box Elder County, } ss:

On the second day of January, 1883, before me, John D. Burt, probate judge, Box Elder county, Utah, personally came John W. Kerr, Alexander Toponce, John K. Fowler and Derastus H. Spencer, to me personally known to be the same persons named in and who subscribed the foregoing agreement for the incorporation of the Corinne Mill, Canal & Stock Company, and they acknowledged that they and each of them executed said agreement freely and voluntarily, and for the uses and purposes therein mentioned.

JOHN D. BURT,
Probate Judge, Box Elder Co., Utah Territory.

TERRITORY OF UTAH, }
Box Elder County, } ss:

In the Matter of the Incorporation of the Corinne Mill, Canal & Stock Company.

The agreement of the incorporation of the Corinne Mill,
361 Canal & Stock Company, and oath and acknowledgement of the corporation thereto, and the bonds and oaths of the officers of said company all having been filed, approved and found regular and in accordance with law, it is now adjudged that the Corinne Mill, Canal & Stock Company is a body corporate, duly organized, with the rights, privileges and franchises granted by law to corporations.

And I direct that the clerk of the probate court of Box Elder county, in the Territory of Utah, issue under the seal of said court, and deliver to said company a certificate as provided by section 533 of the Compiled Laws of the Territory of Utah.

Witness my hand at Brigham City in said county this 2nd day of January, 1883.

JOHN D. BURT,
Probate Judge, Box Elder County, Utah.

TERRITORY OF UTAH, }
County of Box Elder, } ss:

I hereby certify that the within is a true and correct copy of the original document as appears on record in my office, Brigham City, Box Elder county, Utah Territory.

Witness my hand and seal of my office in Brigham City this 2nd day of January, A. D., 1883.

——— ———.

Indorsements: Corinne Mill, Canal and Stock Company, incorporated January 1, 1883. Filed for record January 2, 1883.

362 UNITED STATES OF AMERICA, } ss:
Territory of Utah, County of Box Elder, }

To the association known by the name of the "Corinne Mill, Canal and Stock Company:"

I, Peter F. Madsen, clerk of the probate court, in and for the aforesaid county, under and by the direction of Hon. John D. Burt, judge of the said court, do hereby certify that the aforesaid company, viz: the "Corinne Mill, Canal and Stock Company" has duly filed in my said office the agreement of incorporation, duly acknowledged, together with the oath of the incorporators, oath of office and bond of each officer, as required by acts of the governor and Legislature Assembly of the Territory of Utah, entitled "An act for incorporating mining, manufacturing, commercial and other industrial pursuits."

Attest, my hand and the great seal of the Territory of Utah, this fifth day of January, A. D. 1883.

[SEAL.] ARTHUR I. THOMAS,
Secretary of Utah.

Approved February 18, 1870, and all *their* laws amendatory to, or in aid thereof, and said company is hereby constituted a body corporate with the rights of succession as specified in their said articles of incorporation, and is hereby authorized to exercise all the function-, enjoy all the privileges of a corporation and to
363 transact all business of said corporation as specified in the said articles of incorporation.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 2d day of January, A. D., 1883.

[SEAL.] P. F. MADSEN, *Clerk.*

TERRITORY OF UTAH, } ss:
County of Box Elder, }

I hereby approve of the issuance of the foregoing certificate.

JOHN D. BURT,
Probate Judge.

UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } ss:
Secretary's Office, }

I, Arthur L. Thomas, secretary of the Territory of Utah, do hereby certify that certified copies of the articles of agreement and of the certificate of incorporation of the "Corinne Mill, Canal & Stock Company," have this day been filed in my office. Fees $5; paid.

Exhibit R.

By-laws of the Corinne Mill, Canal & Stock Company of Utah.

Article I. The board of directors shall have and exercise all the power usually had by boards of directors of business corporations, and shall determine and fix the compensation of all officers of the company, and shall have power to remove any officer for cause, and fill any vacancy in office, and their appointee shall hold office
364 until the next subsequent annual election or until otherwise ordered by said board. They shall also have power through the president to call special meetings of the board, or of the stockholders when they deem it for the interests of the company, or upon the request of any person or persons holding one-third of all the capital stock of said company, as provided in article II of these by-laws, and generally shall have supervision over all the business affairs of said company.

Article II. All special meetings of the stockholders shall be called by a notice, stating the purpose of the meeting, to be published in a newspaper, printed in the English language at Salt Lake City, Utah, daily for two successive weeks next preceding the date of the meeting.

Article III. The president shall preside at all meetings of the stockholders and directors, and in case of a tie shall have the casting vote. Shall sign all certificates of stock, all contracts, and all other instruments of writing which have first been approved by the board. And shall also sign all checks and warrants for money in the absence of the secretary and treasurer, and generally do and perform such other duties as are incidental to his office and not in conflict with these by-laws and the articles of association.

In the absence of the president the vice-president shall act, and in the absence of both, a president *pro tempore* shall be elected
365 by and from the board of directors, who shall, for the time being, be empowered to do and perform all the duties of the president.

Article IV. The secretary shall keep a record of all official proceedings of the board of directors and stockholders in a book to be provided for that purpose.

The treasurer shall be custodian of all funds, and official books and papers of the company, and make no payment except on warrant or check signed by the president.

Shall keep a record of the same, and shall make monthly and annual reports to the board of directors, showing the general and detailed business and financial condition of the company, and shall do and perform such other duties as usually pertain to such an office and prescribed by the board of directors.

All official books and papers in the office of the secretary and treasurer shall be subject to inspection by any director of the company during business hours.

Article V. It shall be the duty of the superintendent to take charge

of all the property belonging to the company, to control and direct, subject to the order of the board of directors all labor, and business pertaining to the interests of the company, at the ranch, mill, canal, store and herds of stock, to make monthly reports of all persons employed and their wages and a statement of all expenditures shall accompany such reports with the necessary vouchers.

366 He shall also make a monthly report, upon blanks, to be furnished him for the purpose, showing the general condition of the ranch, mill, canal and stock belonging to the company, and the work done on and at the same. Shall likewise report all tools, supplies and number of stock on hand, sold and dead.

Article VI. Certificates of stock shall be of such form and device as the board of directors may adopt. Each certificate shall be signed by the president, or vice-president and secretary, and shall express on its face its number, date of issuance, and the number of shares for which, and the name of the person to whom issued.

Sufficient shares of stock shall be withheld, as a guarantee for any indebtedness due said company by any shareholder.

The shares of said company may be transferred by the holder thereof, or by their legal representatives. Such transfer shall be made by indorsements on the certificates of stock and the surrender of the same, but such transfer shall only be valid between those two until the same shall have been noted in proper form on the stock ledger of the company.

The surrendered certificate shall be canceled and presented by the secretary and a new one issued in lieu thereof.

PLAINTIFF'S EXHIBIT S.

Directors' Meeting.

At a meeting held by the board of directors of the Corinne
367 Mill, Canal & Stock Company, at the office of said company in Corinne, Box Elder county, Utah, on the 17th day of February, 1883, a full board was present, and, on motion and seconded and after consideration, the following by-laws were unanimously adopted, to wit:

By-laws of the Corinne Mill, Canal & Stock Company of Utah.

Article I. The board of directors shall have and exercise all the power usually had by boards of directors of business corporations, and shall determine and fix the compensation of all officers of the company, and shall have power to remove any officer for cause and fill any vacancy in office, and their appointee shall hold office until the next subsequent annual election, or until otherwise ordered by said board. They shall also have power through the president to call special meetings of the board or of the stockholders when they deem it for the interest of the company, or upon the request of any person or persons holding one-third of all the capital stock of said company, as provided in article II of these by-laws, and, generally, shall have supervision over all the business affairs of said company.

Article II. All special meetings of the stockholders shall be called by notice, stating the purpose of the meeting, to be published in a newspaper, printed in the English language, at Salt Lake City, Utah, daily for two successive weeks next preceding the date of the meeting.

368 Article III. The president shall preside at all meetings of the stockholders and direct-s, and in case of a tie shall have the casting vote.

Shall sign all certificates of stocks, all contracts, and all other instruments of writing which have first been approved by the board; and shall also sign all checks and warrants for money in the absence of the secretary and treasurer, and generally do and perform such other duties as are incidental to his office and not in conflict with these by-laws and the articles of association.

In the absence of the president, the vice-president shall act, and in the absence of both a president *pro tempore* shall be elected by and from the board of directors, who shall, for the time being, be empowered to do and perform all the duties of the president.

Article IV. The secretary shall keep a record of all official proceedings of the board of directors, and stockholders in a book to be provided for that purpose. The treasurer shall be custodian of all funds, and official books and papers of the company, and make no payment, except on warrant or check signed by the president. Shall keep a record of the same, and shall make monthly and annual reports to the board of directors, showing the general and detailed business and financial condition of the company, and shall do and perform such other duties as usually pertain to such an office and prescribed by the board of directors. All official books and papers, in the office of the secretary and treasurer, shall be subject to inspection by any director of the company during business hours.

369 Article V. It shall be the duty of the superintendent to take charge of all the property belonging to the company—to control, and direct, subject to the order of the board of directors, all labor and business pertaining to the interests of the company, at the ranch, mill, canal, store and herds of stock—to make monthly reports of all persons employed, and their wages, and a statement of all expenditures shall accompany such reports with the necessary vouchers. He shall also make a monthly report, upon blanks to be furnished him for that purpose, showing the general condition of the ranch, mill, canal and stock belonging to the company, and the work done on and at the same. Shall likewise report all tools, supplies and number of stock on hand, sold and dead.

Article VI. Certificates of stock shall be of such form and device as the board of directors may adopt. Each certificate shall be signed by the president or vice-president and secretary, and shall express on its face, its number, date of issuance and the number of shares for which, and the name of the person to whom issued.

Sufficient shares of stock shall be withheld as a guarantee for any indebtedness due said company by any shareholder.

The shares of said company may be transferred by the holder

thereof, or by their legal representatives. Such transfer shall be made by indorsements on the certificates of stock and the
370 surrender of the same, but such transfer shall only be valid between those two until the same shall been noted in proper form on the stock ledger of the company.

The surrendered certificate shall be cancelled and presented by the secretary and a new one issued in lieu thereof.

On motion of D. H. Spencer, in accordance with a proposition and bill rendered including about 12,400 sheep and lambs, 17 head of horses and mules, one boro, seven wagons, together with tents, camp outfit, etc., were purchased from John W. Kerr for the sum of $80,000; also 15 head of horses as per bill rendered for the sum of $2,575.

And from Alexander Toponce, as per bill rendered, 78 head of horses, 16 head of cattle, 6 head of hogs, and wagon, harness, saddle, &c., amounting to $9,657. Also from Mrs. Kate Toponce, as per bill rendered, 3 head of horses, amounting to $290. And from John H. Toponce, as per bill rendered, 2 head of horses, amounting to $165.

JOHN W. KERR, *President.*

J. K. FOWLER, *Secretary.*

I hereby certify that the foregoing is a correct copy.

J. K. FOWLER, *Secretary.*

Stockholders' Meeting.

At a meeting of the stockholders of the Corinne Mill, Canal & Stock Company, held at the office of said company, in Co-
371 rinne, Box Elder county, Utah, on the 17th day of February, 1883, the whole capital stock was represented, and on motion made and seconded, and after consideration, it was unanimously adopted.

Resolved, That to purchase property to carry on the business authorized by the articles of association and to improve the properties of the company, and to provide funds to carry out the general purposes of this company, it will make and negotiate a series of one hundred and fifty coupon bonds, each for one thousand dollars, payable on the first day of July, 1893, with interest after the first day of July, 1883, at the rate of seven per cent. per annum, payable semi-annually, on the first day of each January and July on presentation, and surrender of the interest coupons to be annexed to said bonds, both principal and interest payable at the bank of Wells Fargo & Co., in the city of Salt Lake, Utah. The said bonds shall be secured by a trust deed to a trustee of the franchise of the corporation and all its properties, rights and interests now owned or hereafter acquired, that said bonds shall provide the same shall not be obligatory until a certificate on each shall be signed by the trustee to the effect that it is one of the series secured by said trust deed; and also provide that the principal shall become due before the time named in the bond for maturity for default in the payment of interest and in the manner provided in said deed.

Resolved, That John W. Kerr as president and John K. Fowler as secretary of this company, are authorized to make and
372 execute said bonds, and the signature of said secretary, printed, engraved or lithographed to the coupons, shall be binding on this company to the same extent as if written with his proper hand; also to make and execute and deliver in behalf of this company a trust deed to a trustee to be selected by them, to secure the payment of said bonds and the interest thereon, equally and *pro rata*, and without preference arising out of the date of negotiation; that said deed shall convey the franchise of this company, and all its properties, rights and interests, real and personal, now owned, or hereafter acquired, and said deed may provide for a sale, both by the trustee and by judicial process, of the property conveyed, on default of payment of principal or interest, and the application of the proceeds to the payment of the principal and interest of said bonds; also that for default of payment of interest the principal shall become due, and also contain all such usual and proper conditions as the president and secretary may, in their discretion think proper.

Resolved, That John W. Kerr, the president of the company, be and is hereby authorized to negotiate and sell such bonds, on such terms as he may deem best for the interest of the company.

JOHN W. KERR, *President.*

J. K. FOWLER, *Secretary.*

I hereby certify that the foregoing is a correct copy.

J. K. FOWLER, *Secretary.*

373 *Directors' Meeting.*

At a meeting of the board of directors of the Corinne Mill, Canal and Stock Company, held at the office of said company in Corinne, Box Elder county, Utah, on the 17th day of February, 1883, a full board was present, and on motion and seconded it was unanimously

Resolved, That to purchase property to carry on business authorized by the articles of association, and to improve the properties of the company, and provide funds to carry out the general purposes of this company, it will make and negotiate a series of one hundred and fifty coupon bonds, each for one thousand dollars, payable on the first day of July, 1893, with interest, after the first day of July, 1883, at the rate of seven per cent. per annum, payable semi-annually, on the first day of January and July on presentation and surrender of the interest coupons to be annexed to said bonds, both principal and interest payable at the bank of Wells-Fargo & Co., in the city of Salt Lake, Utah. The said bonds shall be secured by a trust deed to a trustee of the franchise of this corporation and all its properties, rights and interests, now owned or hereafter acquired. That said bonds shall provide the same shall not be obligatory until a certificate on each is signed by the trustee, to the effect that it is one of the series secured by said trust deed,

and also provide that the principal shall become due before
374 the time named in the bond for maturity, for default in the payment of interest and in the manner provided in said deed.

Resolved, That John W. Kerr, as president, and John K. Fowler, as secretary of this company, are authorized to make and execute said bonds and coupons, and the signature of said secretary, printed, engraved or lithographed to the coupons, shall be binding on this company to the same extent as if written with his proper hand; also, to make, execute and deliver in behalf of this company a trust deed to a trustee to be selected by them, to secure the payment of said bonds and the interest thereon, equally and *pro rata*, and without preference arising out of the date of negotiation, that said deed shall convey the franchise of this company, and all its properties, rights and interests, real and personal, now owned or hereafter acquired, and said deed may provide for a sale, both by the trustee and by judicial process, of the property conveyed on default of payment of principal or interest, and the application of the proceeds to the payment of the principal and interest of said bonds; also, that for default of payment of interest, the principal shall become due, and also contain all such usual and proper conditions as the president and secretary may in their discretion think proper.

Resolved, That John W. Kerr, the president of this com-
375 pany, be, and he is hereby authorized to negotiate and sell said bonds, on such terms as he may deem best for the interest of the company.

JOHN W. KERR, *President.*
J. K. FOWLER, *Secretary.*

I hereby certify that the foregoing is a correct copy.

J. K. FOWLER, *Secretary.*

Directors' Meeting.

At a meeting of the board of directors of the Corinne Mill, Canal & Stock Company, held at the office of the company, in Corinne, Box Elder county, Utah, on the 7th day of June, 1883, there were present John W. Kerr, Alexander Toponce, Derastus H. Spencer, John K. Fowler and Ira H. Fowler.

On motion duly seconded the following preamble and resolutions were unanimously adopted, to wit:

Whereas, the president of the company has negotiated a purchase of about 50,073.23 and 23,360, total, 73,433.23 acres of land of the Central Pacific Railway Company, and the terms of the purchase, and the lands to be purchased are particularly mentioned in a contract executed on the part of said railway company and to be executed by this company, bearing date the 6th day of April, 1883, and whereas the terms of said agreement are fully known to the board and approved:

Resolved, That John W. Kerr, as president of the company and

John K. Fowler, as secretary thereof, be and they are hereby
376 authorized to execute said contracts in the name and in behalf of this company, and to affix thereto the corporate seal of the company, and the act- of the president in negotiating said contract and making partial payment thereon are ratified and approved.

JOHN W. KERR, *President.*
JOHN K. FOWLER, *Secretary.*

I hereby certify that the foregoing is a correct copy.
J. K. FOWLER, *Secretary.*

Stockholders' Meeting.

At a meeting of the stockholders of the Corinne Mill, Canal and Stock Company, held at the office of the company, in the city of Corinne, in the county of Box Elder, in the Territory of Utah, the entire capital stock of the company was represented at the meeting by the owners thereof and their proxies, to wit:

John W. Kerr, owning 50,000 shares.
Alexander Toponce, owning 50,000 shares.
John K. Fowler, owning 6 shares.
Derastus H. Spencer, owning 5 shares.
Ira H. Fowler, owning 5 shares.

The meeting having been called for the purpose of considering an amendment to the agreement of the association increasing the capital stock of the company from six hundred thousand dollars to one million dollars, or such other amount as might be agreed to, and increasing the number of shares, from one hundred and twenty thousand shares, of five dollars each, to two hundred thou-
377 sand shares of five dollars each, or increasing the shares to such number as might be agreed, and the following amendment to the articles of agreement of the association having been presented to the meeting, to wit:

Amendment to the Agreement of Association of the "Corinne Mill, Canal & Stock Company."

The articles and agreement of association of the "Corinne Mill, Canal & Stock Company" are hereby amended as follows:

Article V of said agreement is amended so as to read: The amount of the capital stock of the corporation shall be $1,000,000, divided into 200,000 shares of the denomination of $5 each.

The proposed amendment having been duly considered, on motion duly seconded, it was unanimously voted and

Resolved, That the said amendment be, and the same is hereby adopted.

The affirmative vote was unanimous and represented the entire capital stock of the company.

Resolved, That the president and secretary of this company are authorized and directed to certify the foregoing amendment, and

file the same in the office of the secretary of Utah Territory, and in the office of the probate court with the clerk of that court, of the county of Box Elder, in said Territory.

Corinne City, June 7, 1883.

JOHN W. KERR, *President.*

JOHN K. FOWLER, *Secretary.*

I hereby certify that the foregoing is a correct copy.

J. K. FOWLER, *Secretary.*

378 CORINNE CITY, *January* 19, 1884.

At a meeting held by the following directors—being present, viz: John W. Kerr, John K. Fowler, D. H. Spencer and Ira H. Fowler, the following resolutions were unanimously passed:

Resolved, That the secretary be hereby authorized to sign a certain contract with Dr. F. E. Roche for the sale of certain lands purchased of the Central Pacific Railway Company last April. Likewise another certain contract with the said railway company for about 23,360 acres purchased on or about the 14th day of May, 1883, in townships 10, 11, 12 and 13, R. 4 W., Salt Lake meridian.

Said contract to be executed of this date.

Attest: J. K. FOWLER, *Secretary.*
JOHN W. KERR, *President.*

I hereby certify that the foregoing is a correct copy.

J. K. FOWLER, *Secretary.*

CORINNE CITY, *October* 27, 1884.

At a meeting held by the following directors, being present, viz: John W. Kerr, president; A. Toponce, vice-president; D. H. Spencer, and J. K. Fowler.

The following resolutions were unanimously passed:

That John W. Kerr, president, be and he is hereby authorized to endorse all warrants or drafts issued by any officer of the United States Government, and made payable to the order of the Corinne Mill, Canal and Stock Company, such endorsement to be as follows:

379 CORINNE MILL, CANAL AND STOCK CO.,
By JOHN W. KERR, *President.*

Attest: JOHN W. KERR, *President.*
J. K. FOWLER, *Secretary.*

I hereby certify that the foregoing is a correct copy.

J. K. FOWLER, *Secretary.*

CORINNE CITY, *January* 15, 1885.

At a meeting held by the following directors being present, viz: John W. Kerr, president, A. Toponce, vice-president, J. K. Fowler and Ira H. Fowler.

On motion of A. Toponce, the following preamble and resolution was unanimously passed, viz:

Whereas, on December 31, 1884, John W. Kerr did furnish and pay to the Central Pacific Railway Company on account of land purchased of said railway company by the Corinne Mill, Canal and Stock Company in 1883 the two several sums of $7,599 and $2,060, for the credit, use and benefit of said Corinne Mill, Canal and Stock Company, Therefore be it

Resolved, that in consideration of said payments by said Kerr, the president and secretary of this company, are hereby authorized and directed to execute an assignment to the Central Pacific Railway Company, for the following-described lands in favor of said Kerr or assigns, viz: All of section 21, W. ½ of 23, 27, 33, 35, in township 13, N., R. 3 W. All of section 3, 9, 11, and north half of
section 15—5,120 acres in township 12 N. R. Salt Lake
380 meridian. And section 1, 3, 11, 13, and 15 in township 11
N. R. 4, West Salt Lake meridian.

Attest: JOHN W. KERR, *President.*
J. K. FOWLER, *Secretary.*

I hereby certify that the foregoing is a correct copy.
J. K. FOWLER, *Secretary.*

CORINNE CITY, *January* 1, 1883.

Corinne Mill, Canal & Stock Company:

I will take $80,000 for my entire lot of sheep and sheep outfit, near Bryan, Wyo., consisting of about 12,400 head of sheep and lambs, 4 mules, 1 boro, 13 horses, including gray horses at your (Toponce) ranch, instead of black mares taken from there by steed; 5 good covered sheep wagons, 1 job wagon, 1 light wagon without bed, at Hopper's, Salt Lake, 2 to 4 tents, 2 to 4 good pack saddles, 2 to 3 good saddles, harness for 6 to 7 pair of horses and mules, 5 camp outfits, 1 needle, 1 Winchester and 2 Parker first-class shotguns and reloading tools, 5 best wool mattresses, tools. At Hilliard there are 1 best-style wool press, 1 900-gallon good boiler, 1 40-gallon iron kettle A No. 1, 1 sheep-dipping vat with ample and good close and dipping pens, good and ample corrals and alleys, with dodge gate and shearing pens, from — to 10,000 pounds best sheep dip tobacco, sulp-ur, not less than 1 barrel, all provisions on hand the morning January 1.

My intention herein is to include every animal and prop-
381 erty, and thing belonging or incidental to my sheep business,
except my sheep books and accounts.

Payments as follows:

First. Fifteen thousand your capital shares, at 60 cents per share.

Second. Balance, seventy-one thousand dollars ($71,000), with your note, with a pledge for my protection, first with interest at 7 per cent. per annum, payable monthly.

Third. On the issue of the first-mortgage bonds, by you, sufficient of them to be handed me for ample security for your indebtedness to me.

Fourth. At your option until March 1st to take or reject, I will give you out of my indebtedness due me $3.25 per head for all lambs that said sheep may drop on or before May next, said lambs to be alive and counted to me at trimming time, but to run with their mothers, free of expense to me, until December 1st, except where the buck lambs, saved from said lot of lambs as I may direct, becomes dangerous for tupping the ewes, may be separated from their mothers and placed in your weather band, good care be taken of all said lambs till turned over to me or my assigns.

Good for — days.

Respectfully, JOHN W. KERR.

By a resolution of the board of directors of the Corinne Mill, Canal & Stock Company, February 17, 1883, the above proposition was accepted.

J. K. FOWLER, *Secretary.*

382 Office of Corinne Mill, Canal and Stock Company.

CORINNE CITY, *November* 7, 1887.

At a meeting of the board of directors of the Corinne Mill, Canal and Stock Company, held at the office of the company in Corinne, Box Elder county, Utah, on this seventh day of November, 1887, at 10 o'clock a. m., there were present John W. Kerr, president, J. K. Fowler, secretary and treasurer and Ira H. Fowler. On motion duly seconded the following resolution was unanimously adopted, viz:

Resolved, That the president of this company be and he is hereby authorized and directed to call special meetings of the board of directors or stockholders of this company, at any time when in his discretion he deems it for the interest of the company, notice thereof to be given personally or by post, to be held at the general office. And that he is hereby authorized and directed to call a special meeting of the board of directors of this company to be held at its office at Corinne on the 8th day of November, 1887, at 2 o'clock p. m. of that day for the purpose of acting on the resignation of D. H. Spencer, director, and if accepted, for the additional purpose of electing a successor and filling the vacancy.

And for the further purpose of authorizing and directing the president and secretary of this company to sign and issue
383 shares of this company's stock to certain parties in accordance with former understandings.

Likewise to authorize said president and secretary to execute in the name of the company, any instrument of writing under seal, or otherwise that may be necessary for the purpose of selling, or perfecting any title to lands sold by said company.

Likewise to elect a superintendent and to transact such other business as may come before the board.

JOHN W. KERR, *President.*
J. K. FOWLER, *Secretary.*

Office of Corinne Mill, Canal & Stock Company.

CORINNE CITY, UTAH, *November* 8, 1887.

At a meeting of the board of directors of the Corinne Mill, Canal & Stock Company, held at the office of the company in Corinne, Box Elder county, Utah, on the 8th day of November, 1887, at 2 o'clock p. m., there were present John W. Kerr, president; J. K. Fowler, secretary and treasurer, and Ira H. Fowler.

On motion of J. K. Fowler, the resignation of D. H. Spencer as director of this company was received and accepted.

And on motion of J. K. Fowler, Charles Carson, of Salt Lake City, Utah, was chosen a director of this company to fill the vacancy occasioned by the resignation of D. H. Spencer.

On motion of J. K. Fowler it was

Resolved, That the president and secretary of this company
384 be, and are hereby authorized and directed to sign and issue shares of this company's stock to the following-named persons: Edward E. Spencer, Cornelius P. Groot, Sarah J. Fowler, Kate Toponce, Ira H. Fowler, Isader Morris, Henry Siegal, Joseph Siegal, Lucius A. Billings, Frank M. Edger, George Symons, Derastus H. Spencer, Alexander Toponce, John W. Kerr, Mary J. Pitts, Harry T. Duke, Clayton S. Haines, Theodore S. Lee, Wm. W. Walkins. And that said president and secretary be further authorized and directed to execute in the name of the company any instrument of writing, under seal or otherwise, that may be necessary for the purpose of perfecting titles in pursuance of contracts made heretofore or may be hereafter made and entered into by said president and secretary in selling said company's lands and generally in any — company's business.

On motion of J. K. Fowler it was resolved that John W. Kerr be and he hereby is appointed manager of the company, with power to appoint and discharge such assistants as in his judgment may be necessary for carrying on the company; subject, however, at all times to the direction of the board of directors.

On motion adjourned.

Attest: J. K. FOWLER, *Secretary.*

Approved:

JOHN W. KERR, *President.*

At the regular annual meeting of the stockholders of the Corinne Mill, Canal & Stock Company, held at the office of the company at Corinne, Utah, on December 19, 1887, at 10 o'clock a. m., the following business was transacted, to wit:

385 Mr. John W. Kerr, the president, took the chair, and J. K. Fowler, the secretary, acted as secretary of the meeting.

Proof of due publication of the notice of the meeting was first read by the secretary and ordered filed, to wit:

Proof of Publication.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

William W. Rivers, being first duly sworn, deposes and says, that he is the chief clerk of the Salt Lake Tribune, a newspaper published in Salt Lake City, Salt Lake county, Utah Territory.

That the notice of stockholders' meeting of Corinne Mill, Canal & Stock Company, of which a copy is hereto attached, was first published in said newspaper, in its issue dated the 4th day of December, 1887, and was published in each daily issue of said newspaper for fourteen days thereafter, the full period of fifteen days, the last publication thereof being in the issue dated the 18th day of December, 1887.

WM. W. RIVERS.

Subscribed and sworn to before me this 19th day of December, 1887.

[NOTARIAL SEAL.] HOMER F. ROBINSON,
Notary Public.

The following stock was represented at the meeting by the owners thereof and their proxies, to wit:

John W. Kerr, owning 61,240 shares.
386 Tom D. Pitt, owning 1,875 shares.
James T. Pitt, owning 1,875 shares.
J. K. Fowler, owning 6 shares.
C. W. Bennett, owning 5 shares.
A. Toponce, by his proxy, J. N. Kimball, 50,000 shares.
Total, 115,001 shares.

By request of A. Toponce the meeting was held open until 12 o'clock m.

On motion of C. W. Bennett, the minutes of the directors' meetings just read by the secretary, embracing all the meetings from February 17, 1883, to November 8, 1887, were adopted, ratified and approved.

The accounts of the company as they appear on the company's books, written up to and including the 30th day of September, 1887, *was* submitted to the meeting by the secretary and treasurer, and the meeting went into a committee of the whole for the purpose of examining and auditing said accounts, and after such examination and audit and some discussion, the following resolution was passed by a majority vote of all stockholders present, 65,001 shares voting for and 50,000 shares voting against its passage, to wit:

Resolved, That each and all the accounts of this company, as they now appear on the company's account books, be and they are hereby ratified, approved and confirmed in all respects, items and details, and declared accurate and correct

Previous to the above vote being cast J. N. Kimball, proxy for A. Toponce, made the following protest, viz:

A. Toponce, by J. N. Kimball, his proxy, objected to John W. Kerr voting at the meeting more than 50,000 shares of stock, and protested against his voting more — that number of shares on the ground that the 1,500 shares of trust stock heretofore issued to said Kerr were improperly, wrongfully and without authority issued to him.

On motion duly seconded, the following resolution was unanimously adopted, to wit:

Resolved, That articles I and II of the by-laws of the company be, and the same are hereby, repealed and annulled, and the following articles I and II are enacted and substituted in *line* thereof, to wit:

Article I. The board of directors shall have and exercise all the powers usually had by boards of directors of business corporations, and shall determine and fix the compensation of all officers of the company, and shall have power to remove any officer for cause, and fill any vacancy in office, and their appointee shall hold office until the next subsequent election, or until otherwise ordered by said board.

Article II. The president shall call all special meetings of the board of directors and of the stockholders at such times as he may think proper, and also upon the receipt of the holder or holders of one-third of all the capital stock. Five days' notice of the time and place of special directors' meetings shall be by the president given to each director personally or by mail, postpaid and addressed, unless the directors meet without notice.

Notice of the time, place and object of special stockholders' meetings to be held for the purposes specified in section- 7 and 8 of subchapter 1 of chapter XLV, Laws of Utah, approved March 13, 1884, shall be by the president, caused to be published for the length of time required by said sections 7 and 8 respectively in some newspaper printed in English language in Utah, and having a general circulation in Box Elder county, Utah. Notice of the time, place and object of all other special stockholders' meetings shall be by the president caused to be published for ten days next preceding the date of the meeting in some newspaper, printed in English in Utah, and having a general circulation in Box Elder county, Utah.

On motion duly seconded, the meeting proceeded to vote by ballot for directors and officers of the company for the ensuing years, those present being entitled to cast and casting a vote for each share of stock by them held.

The vote was as follows:

For directors:

John W. Kerr received 115,001 votes.

C. W. Bennett received 65,001 votes.

J. K. Fowler received 115,001 votes.

Tom D. Pitt received 65,001 votes.

James T. Pitt received 65,001 votes.

A. Toponce received 50,000 votes.

Ira H. Fowler received 50,000 votes.
D. H. Spencer received 50,000 votes.
For president, John W. Kerr received 115,001 votes.
For vice-president, C. W. Bennett received 64,896 votes.
For treasurer, J. K. Fowler received 115,001 votes.
For secretary, J. K. Fowler received 115,001 votes.

On motion duly seconded, the meeting adjourned till the third Monday in January, 1888, at one o'clock p. m. of that day, at the company's office in Corinne, Box Elder, Utah.

(Signed) JOHN W. KERR, *President.*
Attest: J. K. FOWLER, *Secretary.*

I hereby certify that the foregoing is a true, and correct copy of the minutes of the stockholders' annual meeting of the Corinne Mill, Canal and Stock Company, held at the office of said company in Corinne, Utah, December 19, 1887, and now on record in my office.

J. K. FOWLER,
Secretary C. M., C. & S. Co.

Filed March 17, 1889.

H. H. HENDERSON, *Clerk,*
By A. H. DRAKE, *Deputy Clerk.*

EXHIBIT T.

No. 1. SALT LAKE CITY, UTAH, *Sept.* 22, 1887.

The Deseret National bank, pay to H. Cohn & Co., in full
390 for bill tobacco, or bearer, one hundred and twenty-seven and thirty-six one-hundredths ($127.36) dollars.

CORINNE MILL, CANAL & STOCK CO.
A. TOPONCE, *General Manager.*

Endorsed: H. COHN & CO., F. AUERBACH BROS.

EXHIBIT S.

CORINNE, UTAH, *January* 7, 1887.

Messrs. White & Sons, Salt Lake.

GENTLEMEN: I have just been looking at the feed on our range and find it good, and stock doing well. If you want to send your cattle here and pasture them until June or July 1st, you can do so for twenty cents a head per month. Bills for pasture payable quarterly, and we are not responsible for them except from carelessness. They will run with our own stock and receive the same care and attention.

If you conclude to send them let me know at once, as there are other parties who want to have their stock pastured and we only want to take one lot.

The cattle must be all branded with a uniform brand.

Respectfully, A. TOPONCE,
Manager C. M., C. & S. Co.,
Per FOWLER.

EXHIBIT U.

No. 2. SALT LAKE CITY, UTAH, *September* 23, 1887.

The Deseret National bank, pay to T. B. Barnes or bearer thirty-four and thirty-eight one-hundredths in full of account ($34.38) dollars.

CORINNE MILL, CANAL & STOCK CO.
A. TOPONCE, *General Manager.*

Endorsed: T. B. BARNES.

391 EXHIBIT V.

No. 3. SALT LAKE CITY, UTAH, *September* 24, 1887.

The Deseret National bank, pay to Hans Jeppsen or bearer thirty-two ($32) dollars.

CORINNE MILL, CANAL & STOCK CO.
A. TOPONCE, *General Manager.*

Endorsed: HANS N. JEPPSEN.

Pay McCornick & Co., Salt Lake City, for collection and account of J. W. Guthrie, banker, Corinne, Utah.

EXHIBIT W.

No. 4. SALT LAKE CITY, UTAH, *October* 11, 1887.

The Deseret National bank, pay to N. T. Anderson, account survey Walker land, or bearer, ten ($10) dollars.

CORINNE MILL, CANAL & STOCK CO.
A. TOPONCE, *General Manager.*

Endorsed: N. P. ANDERSON.

Pay to the order of First National bank, Ogden, Utah, for credit of B. M. & M. Association of Brigham City, Utah.
Pay to the order of Deseret National bank, Salt Lake City, for credit of First National bank, Ogden, Utah.

H. S. YOUNG, *Cashier.*

EXHIBIT X.

No. 5. SALT LAKE CITY, UTAH, *October* 11, 1887.

The Deseret National bank, pay to Joseph Jensen, account bill hay, or bearer, eighty-four ($84) dollars.

CORINNE MILL, CANAL & STOCK CO.
A. TOPONCE, *General Manager.*

Endorsed: JOSEPH JENSEN.

392 For deposit with First National bank, Ogden, Utah, for credit of Box Elder Stock & Mercantile Company.

Pay to the order of Deseret National bank, Salt Lake City, for credit of First National bank, Ogden City, Utah.

H. S. YOUNG, *Cashier.*

EXHIBIT Y.

No. 6. SALT LAKE CITY, UTAH, *October* 29, 1887.

The Deseret National bank, pay to Hall & Marshall or bearer, six hundred dollars ($600.)

CORINNE MILL, CANAL & STOCK CO.
A. TOPONCE, *General Manager.*

Endorsed: HALL & MARSHALL.

EXHIBIT Z.

CORINNE, *December* 18, 1882.

Mr. Alex. Toponce:

I will give you ten thousand (10,000) dollars for the one-half, undivided interest in your mill, ditch and your interest in the ranch property—then mill, ditches and ranch properties thrown together, with all privileges and advantages thereto belonging. Stock the same, you having one-half of the stock or shares and I the other half. You selling your horses, cattle and farming implements such as may be beneficial to said company and I to do the same with my horses at the same rate—the price of said live stock to be reasonable.

Respectfully, JOHN W. KERR.

Accepted.

A. TOPONCE.

Endorsed: 500 Pj. Journal and ledger. January 1, 1883. Paid J. E. Dooly for Alex. Toponce. Note, $14,672.50.

393 DEFENDANT'S EXHIBITS.

EXHIBIT 1.

CORINNE, *July* 1, 1883.

Corinne Mill, Canal & Stock Co.:

I will take eighty thousand (80,000) dollars for my entire lot of sheep and sheep outfit, near Bryan, Wyo., consisting of about 12,400 head of sheep and lambs, 4 mules, 1 boro, 13 horses, including gray horse at your (Toponce) ranch, instead of black mares taken from there by Steed, 5 good covered sheep wagons, 1 job wagon, 1 light wagon without bed at Hopper's, Salt Lake; 2 to 3 tents, 2 to 4 good pack-saddles, 2 to 3 good saddles, harness for 6 to 7 pair- horses and mules, 5 camp outfits, 1 needle, 1 Winchester and 2 Parker first-class shotguns and reloading tools, 5 best wool mattresses, tools; at Hilliard

there are 1 best-style wool press, 1 900-gallon good boiler, 1 40-gallon iron kettle, a No. 1 sheep-dipping vat with ample and good close and dipping pens, good and ample corrals and alleys with dog gate and shearing pens, from 500 to 1,000 pounds best sheep-dip tobacco, sulphur, not less than 1 barrel—all provisions on hand this morning, January 1st.

My intention herein is to include every animal and property, and everything belonging or incidental to my sheep or sheep business except my sheep books and accounts.

Payment as follows:

394 First. Five thousand dollars, your capital shares, at 60 cents a share.

Second. Balance, seventy-one thousand ($71,000) dollars, with your notes, with a pledge for my protection first, with interest at 7 per cent. per annum, payable monthly.

Third. On the issue of first-mortgage bonds by you, sufficient of — to be handed me for ample security for your indebtedness to me.

Fourth. At your option, until March 1st to take or reject, I will give you out of any indebtedness due me $3.25 per head for all said sheep may drop on or about May next—said lambs to be alive and counted to me at trimming time—but to run with their mothers, free of expense to me until December first—except when the buck lambs saved from said lot of lambs as I may direct become dangerous by their tupping the ewes—may be separated from their mothers and placed in your wether band—good care to be taken of all of said lambs to be turned over to me or my agent.

Good for — days.

Respectfully, JOHN W. KERR.

By resolution of the board of directors of the Corinne Mill, Canal & Stock Company, February 17, 1883, the above proposition was accepted.

J. K. FOWLER, *Secretary.*

EXHIBIT 2.

No. 18. CORINNE, UTAH, *January* 27, 1883.

395 Banking-house of J. W. Guthrie, pay to the order of Alex. Toponce, account ex. S. L., or order, one hundred ($100) dollars.

J. K. FOWLER,
Secretary Corinne Mill, Canal & Stock Co.

Endorsed: ALEX. TOPONCE.

EXHIBIT 3.

No. 35. CORINNE, UTAH, *February* 12, 1883.

Banking-house of J. W. Guthrie, pay to Jessee Lee or order six hundred ($600) dollars.

J. K. FOWLER,
Secretary Corinne Mill, Canal & Stock Co.

EXHIBIT 4.

No. 107. CORINNE, UTAH, *April* 10, 1883.

Banking-house of J. W. Guthrie, pay to A. Toponce, account ex. to C. Carson, or order, forty ($40) dollars.

J. K. FOWLER,
Secretary Corinne Mill, Canal & Stock Co.

EXHIBIT 5.

No. 114. CORINNE, UTAH, *April* 12, 1883.

Banking-house of J. W. Guthrie, pay to Alex. Toponce, on account, or order, fifteen ($15) dollars.

J. K. FOWLER,
Secretary Corinne Mill, Canal & Stock Co.

Endorsed: A. TOPONCE.

EXHIBIT 6.

No. 124. CORINNE, UTAH, *April* 16, 1883.

396 Banking-house of J. W. Guthrie, pay to Alex. Toponce, on account, or order, seventy-five ($75) dollars.

J. K. FOWLER,
Secretary Corinne Mill, Canal & Stock Co.

Pay to the order of J. A. Adams.

Endorsed: A. TOPONCE, J. A. ADAMS.

EXHIBIT 7.

No. 249. CORINNE, UTAH, *June* 6, 1883.

Banking-house of J. W. Guthrie, pay to Alex. Toponce, on account, or order, fifty ($50) dollars.

J. K. FOWLER,
Secretary Corinne Mill, Canal & Stock Co.

Endorsed: A. TOPONCE.

EXHIBIT 8.

No. 274. CORINNE, UTAH, *June* 15, 1883.

Banking-house of J. W. Guthrie, pay to A. Toponce, on account or order, ten ($10) dollars.

J. K. FOWLER, *Secretary.*

Endorsed: A. TOPONCE.

EXHIBIT 9.

No. 276. CORINNE, UTAH, *June* 16, 1883.

Banking-house of J. W. Guthrie, pay to A. Toponce, for wife, or order, twenty ($20) dollars.

J. K. FOWLER,
Secretary C. M., C. & S. Co.

Endorsed: A. TOPENCE.

EXHIBIT 10.

No. 387. CORINNE, UTAH, *June* 21, 1883.

397 Banking-house of J. W. Guthrie, pay to yourself, account A. Toponce, Salt Lake ex. or order, forty-two and ten-hundredths ($42.10) dollars.

J. K. FOWLER,
Secretary C. M., C. & S. Co.

EXHIBIT 11.

No. 289. CORINNE, UTAH, *June* 23, 1883.

Banking-house of J. W. Guthrie, pay to yourself, account ex. to hire, A. Toponce or order, fifteen ($15) dollars.

J. K. FOWLER,
Secretary C. M., C. & S. Co.

EXHIBIT 12.

No. 291. CORINNE, UTAH, *June* 26, 1883.

Banking-house of J. W. Guthrie, pay to Alex. Toponce, account homestead entry, or order, twenty-five ($25) dollars.

J. K. FOWLER,
Secretary C. M., C. & S. Co.

Endorsed: A. TOPONCE.

EXHIBIT 13.

No. 195. CORINNE, UTAH, *June* 26, 1883.

Banking-house of J. W. Guthrie, pay to A. Toponce, account wife, or order, ten ($10) dollars.

J. K. FOWLER,
Secretary C. M., C. & S. Co.

Endorsed: A. TOPONCE.

EXHIBIT 14.

No. 522. CORINNE, UTAH, *March* 4, 1884.

J. W. Guthrie, banker, pay to the order of Alex. Toponce, on account, thirty ($30) dollars.

J. K. FOWLER, *Secretary.*

Endorsed: A. TOPONCE.

398 EXHIBIT 15.

No. 557. CORINNE, UTAH, *June* 7, 1884.

J. W. Guthrie, banker, pay to the order of A. Toponce, account self check, five (5) dollars.

J. K. FOWLER, *Secretary.*

EXHIBIT 15.

No. 557. CORINNE, UTAH, *June* 7, 1884.

J. W. Guthrie, banker, pay to the order of self five ($5) dollars.

A. TOPONCE.

EXHIBIT 16.

No. 571. CORINNE, UTAH, *June* 18, 1884.

J. W. Guthrie, banker, pay to the order of A. Toponce, account Salt Lake ex., twenty-five and ten one-hundredths (25.10) dollars.

J. K. FOWLER, *Secretary.*

EXHIBIT 17.

No. —. CORINNE, UTAH, *June* 8, 1885.

J. W. Guthrie, banker, pay to the order of A. Toponce, for freight, ten ($10) dollars.

CORINNE MILL, CANAL & STOCK CO.
A. TOPONCE.

Endorsed: A. TOPONCE.

EXHIBIT 18.

No. 844. CORINNE, UTAH, *May* 13, 1886.

J. W. Guthrie, banker, pay to the order of yourself, on account of draft Kentucky Money Co., one hundred and twenty-five one-hundredths ($100.25) dollars.

J. K. FOWLER, *Secretary.*

399 EXHIBIT 19.

No. 980. CORINNE, UTAH, *September* 19, 1887.

J. W. Guthrie, banker, pay to the order of A. Toponce, account freight on bucks, fifteen dollars.

J. K. FOWLER, *Secretary.*

Endorsed: A. TOPONCE.

EXHIBIT 20.

No. —. CORINNE, UTAH, *July* 20, 1885.

J. W. Guthrie, banker, pay to the order of A. Toponce for account hay, one hundred ($100) dollars.

CORINNE MILL, CANAL AND STOCK COMPANY,
Per A. TOPONCE, *Vice-president.*

EXHIBIT 21.

Inventory of stock on Corinne Mill, Canal & Stock Company's ranch October 1, 1887: Mares, 81; geldings, 41; stallions, 8; yearlings, 30; 2-year-olds, 34; suckers, 52. Total, 246.

Sold: Yearlings, 1.

Died or lost: Mares, 4; yearlings, 2; 2-year-olds, 1.

Total: Suckers sold, 2; suckers died, 2.

Sold and died A. C.: Mares, 4; yearlings, 3; 2-year-olds, 1; suckers, 4.

On hand January 26, 1888: Mares, 77; geldings, 41; stallions, 8; yearlings, 27; 2-year-olds, 33; suckers, 48. Total, 234.

EXHIBIT 22.

Inventory horses and mares on Corinne Mill, Canal & Stock Company's ranch, March 31, 1887.

Stallions, 5; mares, 233; sold, 4; died, 3; total, 245.

400 Mares and geldings not separated, don't include sucking colts.

EXHIBIT 22½.

Toponce Account.

CORINNE, *July*, 1888.

A. Toponce, in account with Corinne Mill, Canal & Stock Co., Dr.

1883.		Dr.	Cr.
Jan. 27.	To check to self	$100 00	
" 31.	By 3 beef hides, 20c	.....	$10 30
" "	To merchandise	26 95	
Feb. 1.	" ½ bill August Nichols	16 25	
" "	" cash to C. T. Good, ac't fare to Salt Lake	5 00	
" "	By bill of expenses to Salt Lake	.....	101 50
" 12.	To check to Jessa Lee	600 00	
" 19.	" cash paid, rubber boots	5 00	
" 20.	By 78 head horses	.....	7,790 00
" "	" 6 cows	.....	210 00
" "	" 10 calves	.....	125 00
" "	" bill, wagon, harness, etc	.....	1,518 50

1883.		Dr.	Cr.
Feb. 20.	By bill, hogs	.....	60 00
" " "	" sundries	.....	154 00
" 22.	To J. W. Kerr, bal. Dooly note and int...	4,750 50	
" "	To J. W. Kerr, paid W., F. & Co., in'st	63 00	
401			
Feb. 22.	By 92 beef	.....	9 20
" "	To 2 bush. wheat	2 00	
" 24.	" ½ bill H. House	11 98	
" 28.	" merchandise, P. L. 106	39 95	
M'ch 3.	" check to Jessa Lee	1,000 00	
" " "	" cash, ½ bill D. D. Ryon	2 38	
" 7.	" Toponce ranch for ac't assumed.	101 58	
" " "	" F. M. Merrill, smithing	2 00	
" 8.	By " "	.....	16 00
" 13.	To M. Durfee, ac't assumed	4 20	
" 20.	To cash, trip to Ogden	5 00	
" " "	" " Salt Lake	15 00	
" " "	" half bill oats, Mrs. Toponce	4 20	
" 23.	By D. W. Newman, bill ranching	.....	6 00
" 29.	" J. K. Green, plow point	.....	1 00
" " "	" H. House bill	.....	32 88
" "	To " " "	25 74	
" 31.	" merchandise	24 49	
Ap'l 7.	" bill, J. M. Walker	5 00	
" 10.	" check 107, ac't Green	40 00	
" " "	" Jessa Lee, ac't assum'd	53 70	
" 12.	" check 114	15 00	
402			
Ap'l 16.	To check 124, to J. A. Stoddard	75 00	
" 30.	" merchandise	13 73	
May 1.	By J. K. Green, for beef	.....	19 92
" 3.	To A. Higby " "	10 00	
" " "	" cash, for beer	5 25	
" 4.	" 2 bush. wheat for Mather	2 00	
" " "	" cash, bill J. W. Walker	2 60	
" 8.	" " order Mrs. Toponce	2 30	
" 18.	" 1 pig	5 00	
" 31.	" check, ac't taxes 1883	10 80	
" " "	" Mrs. M. Toponse, ac't assumed.	2 90	
" " "	" merchandise	25 90	
June 6.	" check 249	50 00	
" " "	" cash, self	12 60	
" " "	" F. Dehler bill, beer	1 75	
" 8.	" H. W. P. Spencer, paper	1 75	
" 11.	" J. M. Walker bill, June 1st, '83.	3 85	
" 15.	" check 274	10 00	

1883.		Dr.	Cr.
June 16.	To check 276, to wife.....	20 00	
" 20.	By P. Peterson, to apply on note..	.....	20 00
" 23.	To check 287, in'st on Dooly note.	42 10	
403			
June 26.	To check 289, to wife.....	15 00	
" " "	" 291, homestead entry...	25 00	
" " "	check 295, to wife.....	10 00	
" 28.	By homestead-entry receipt.....	.....	10 00
" 30.	To merchandise	19 56	
" " "	C. Carson's bill.....	36 02	
July 10.	" 1 bush. wheat.....	1 00	
" " "	F. J. Kiesel bill, whiskey.....	9 25	
" 11.	" F. Dehler bill, beer	5 00	
" " "	cash from drawer.....	26 90	
" 12.	By vou. 146, stallion service.....	.....	19 00
" 17.	To check 313.....	50 00	
" 23.	" " 324.....	100 00	
" 24.	" 1 bush. wheat.....	1 00	
" 31.	" cash to Miss Higby.....	4 00	
" " "	" acc't Salmon River mine..	118 83	
" " "	check 334, J. M. Walker bill..	20 85	
" " "	merchandise...	18 32	
Aug. 2.	" 2 gray horses sold	400 00	
" " "	Central hotel, board to Aug. 1.	20 00	
404			
Aug. 2.	To N. W. Spencer, paper.....	1 75	
" 4.	" cash bill, F. Dehler.....	8 25	
" 10.	" " self S. Lake trip	5 65	
" " "	" check 340.....	150 00	
" 13.	By p'd board Kerr, S. L.....	.....	10 25
" " "	" " self S. L.....	.....	10 75
" 21.	" cash to T. Lee.....	.....	6 00
" 29.	To ½ bal. Kerr & Co. acc't.....	141 72	
Aug. 31.	To Mrs. M. Johana, acc't assumed.	22 08	
Aug. 31.	To mdse.....	10 35	
Sept. 1.	" cash bill, F. Dehler.....	3 25	
" 6.	" F. J. Kiesel & Co., bill, Aug. 9, '83.....	2 00	
Sept. 6.	To check to self May 30.....	30 00	
" 11.	" cash bill, H. W. P. Spencer, Tribune	1 25	
Sept. 12.	D. D. Ryan, bill coal Sept. 10.....	3 75	
Sept. 12.	To check 375.....	15 00	
" 13.	By G. Wolverton, bal. acc't	.....	13 05
Sept. 20.	To check 382.....	90 35	
" 24.	" " 385.....	5 00	
" 25.	" F. J. Kiesel & Co., bill Sept. 15.	8 00	

405

1883.		Dr.	Cr.
Sept. 26.	To check 386, acc't McCornick, draft	50 00	
Sept. 29.	To check 389, acc't McCornick, draft	25 00	
Sept. 29.	To check 390, acc't McCornick, draft	25 00	
Sept. 29.	To cash order to Mrs. Thompson	2 25	
Sept. 29.	To mdse	19 40	
Oct. 1.	To F. Dehler, bill beer	3 25	
" 3.	" H. W. P. Spencer, bill, Tribune	2 65	
Oct. 5.	By T. D. Pitt, rep. watch	.....	3 00
" "	To check 407	100 00	
" "	" Mrs. M. Toponce, acc't assumed	6 24	
Oct. 11.	To cash to C. P. Groot, for meat	1 70	
Nov. 12.	By P. Peterson, acc't to Mrs. Toponce	.....	2 00
Nov. 12.	To cash order to Nelson	95	
Nov. 12.	To cash order to Carter	1 50	
Nov. 12.	To cash to wife	5 00	
" 13.	" D. D. Ryan, bill coal	15 00	
Nov. 13.	To D. D. Ryan, bill coal for mother	3 75	

406

Nov. 13.	To cash bill, J. M. Walker	3 10	
Nov. 22.	To D. D. Ryan, bill coal	7 50	
Dec. 3.	To draft to J. S. Steward	11 10	
Dec. 3.	To draft to T. G. M. Smith	12 10	
Dec. 3.	To cash, self	35 00	
" " " "	" from drawer	16 50	
" 10.	" mdse	46 70	
" 11.	" check 449	20 00	
" 27.	" F. M. Merrill, smithing	50	
Dec. 27.	To cash, draft to J. A. Stoddard	10 15	
Dec. 27.	To cash, draft to McCormick & Co.	15 00	
Dec. 27.	To cash, draft to Walker Bros.	3 75	
Dec. 31.	To acc't M. B. Durfee, assumed	23 20	
Dec. 31.	To F. P. Walker, 6 days' labor on house	16 68	
Dec. 31.	By ½ bal. Kerr & Toponce acc't	.....	8 97
Dec. 31.	To mdse	152 78	

407

1884.			
Jan. 12.	To cash, self	20 00	
" 21.	" " bill, F. A. Church, for coal	17 65	
Jan. 31.	To P. O. Holengren, smithing	3 60	
Jan. 31.	To J. W. Guthrie, bal. on draft $255.25	136 90	

1884.		Dr.	Cr.
Jan. 31.	To mdse	67 10	
Feb. 2.	By P. Peterson, cash, Salt Lake trip	.....	12 00
Feb. 9.	To. G. M. Merrill, smithing	1 50	
Feb. 29.	To mdse	29 25	
M'ch 1.	To cash bill, F. H. Church	60	
M'ch 4.	To check 522	30 00	
" 25.	" mdse	24 50	
" 31.	" "	33 01	
" "	By paid Kerr's ass'm't, Bear River Canal Co	.....	50 00
Apr. 23.	By bal. P. Peterson, acc't transferred	.....	7 35
Apr. 23.	By Mrs. A. Toponce, acc't, Peterson order	.....	59 00
Apr. 23.	By paid Kerr's ass'm't Bear River Canal Co	.....	25 00
Apr. 23.	To mdse	157 85	
" 30.	" H. Foxley, acc't	2 50	
" "	" F. M. Merrill, smithing	1 00	
408			
May 1.	To cash to self	2 50	
" "	" " for taxes	9 00	
" "	" " " "	10 80	
" 6.	" draft to J. A. Stoddard	10 00	
May 12.	To cash held out of ranch bill	9 00	
Mao 17.	To cash, draft to J. B. Rosborough	25 00	
May 31.	To checks acc't 549	25 00	
June 3.	" 100 wheat	1 67	
" 4.	" cash d'ft to G. Chandler	12 95	
" —.	" " d'ft to F. M. Bishop	5 15	
" 11.	" check self	5 00	
" —.	" 100 flour	2 80	
" 13.	" Krigbaum & Co. bill 5-31-'84	5 55	
" 17.	" cash self	5 00	
" 18.	" ch'k to J. B. Rosborough	25 10	
" 24.	" cash	10 00	
" 24.	By cash of R. Oliver	.....	15 00
" 28.	To check 587	5 00	
July 7.	" 60 wheat	1 00	
" 11.	" P. O. Holingren bill, July 1, 1884	3 00	
" 12.	" cash acc't draft to J. A. Stoddard	20 00	
" 22.	" L. L. Daws bill	18 60	
" 28.	" check 612	10 00	
409			
July 31.	By P. Peterson bal. ac. tran'f'd	.....	38 60
" 31.	To Mrs. Toponce ac't assumed	3 80	

1884.		Dr.	Cr.
Aug. 1.	" check 629 bill F. Dehler.....	19 25	
" 12.	" P. O. Holigren bill Aug. 1, 1884.	1 75	
" 16.	" check 639.....	10 00	
" 16.	" 60 wheat.....	1 00	
" 21.	" cash draft to J. B. Rosborough.	25 10	
" "	" cash taxes Mrs. A. Toponce....	2 40	
" 26.	" cash taxes Jesse Lee, horses ...	1 20	
" 26.	" cash ranch bill Spencer & Eckles.....	25 00	
" 30.	" 50 flour.....	1 40	
" —.	" 30 pork	3 75	
Sept. 2.	To 60 wheat	1 00	
" 8.	" F. H. Church bill July 1, 1884.	1 70	
" 18.	" c'k acc't two drafts ex.....	31 20	
" 20.	" one gun sold	35 00	
" 20.	By bill of expense to Ogden	.....	5 00
" 22.	To Krigbaum & Co. bill Aug. 30, 1884.....	24 75	
" 22.	To 90 wheat.....	1 15	
" 30.	" W. B. Bradford moving Watkins' barn	5 00	
410			
Sept. 30.	To acc't Mrs. M. Toponce assessed.	3 70	
Oct. 1.	To Krigbaum & Co. bill Sept. 30, '84	16 80	
" 1.	To check 710	10 00	
" 6.	" check 721 acc't McCornick....	80 00	
" —.	By bill board Continental hotel ..	.....	13 15
" 8.	To 100 screenings	1 00	
" 8.	" 250 flour to Mrs. Gibbs.....	5 00	
" 14.	" check 725.....	20 00	
" 16.	By cash of Lee Owsley	.....	10 00
" 16.	" check homestead entry.....	.....	5 00
" 16.	To 50 flour	1 15	
" 16.	" 100 flour by Landice.....	2 25	
" 27.	" check 736 J. B. Rosborough...	25 10	
" 27.	" check 737 McCornick & Co....	20 10	
" 27.	" check 733 to girl	10 00	
Nov. 3.	By cash to I. Peralto	.....	20 00
" 3.	" cash to J. T. Pitt	.....	15 00
" 5.	To check bill F. Dehler Nov. 1, '84.	20 75	
" 5.	" 50 flour to destitute women ...	1 15	
" 7.	By cash acc't stallion Errick	.....	200 00
" 15.	To nine screenings.....	75	
" 18.	" check for d'ft and ex. Rosborough.....	25 10	
411			
Nov. 18.	To same to Marshall.....	6 10	
" 18.	" cash	5 00	

1884.		Dr.	Cr.
Nov. 24.	To check 772 trip to Bryan.....	50 00	
" 26.	" 100 flour.....	2 25	
" 26.	" 25 cracked wheat.....	75	
" 29.	By ½ bal. J. W. Kerr & Co. acc't..	.....	77 21
Dec. 3.	By cash to L. J. Morris.....	.....	10 00
" 5.	To 60 shorts.....	70	
" 5.	" 90 screenings.....	65	
" 6.	By bill exp. to Granger.....	.....	28 90
" 6.	" check in Johnson case.....	.....	21 50
" 10.	" C. P. Groot, check.....	.....	48 70
" 13.	To check 791.....	98 70	
" 13.	" cash to Lea Owsley at Salt Lake	.....	20 00
" 19.	" cash and boots to J. W. Seymour.....	4 00	
" 31.	By cash to F. Peralto.....	.....	10 00
" 31.	To 190 shorts.....	1 75	
1885.			
Jan. 10.	To 75 wheat.....	75	
" 26.	" 50 flour.....	1 15	
Feb. 16.	" 125 wheat.....	1 25	
M'ch 4.	" 1 case beer.....	2 00	
" "	" Krigbaum & Co., bill.....	43 00	
" 7.	" cash H. House.....	10 00	
" 31.	" 1,000 flour, to Mrs. Greenwald.	20 00	

412

M'ch 31.	To 100 wheat.....	1 00	
" "	By cash to F. Peralto.....	.....	20 00
Ap'l 2.	By cash, bill oats.....	.....	16 54
" 6.	To note, G. N. Harm coll.....	40 00	
" 20.	By bill hay, 4, 20, '85.....	.....	18 00
" 25.	To 50 flour.....	1 15	
May 7.	" cash.....	3 50	
" 9.	" 60 wheat.....	60	
" 13.	By J. H. Toponce, bill H. H. Smith	.....	29 30
" 20.	To H. A. Clawson, bill flour coll..	40 00	
" 23.	" 200 flour.....	4 50	
" "	" 100 wheat.....	1 00	
" 30.	By cash, for 2,150 oats.....	.....	34 50
" "	To 1,043 pork.....	67 80	
" "	By P. Peterson, endorsed on note.	.....	32 12
" 6.	To H. H. Smith's bill.....	12 90	
June 6.	" F. J. Kiesel, bill, gin.....	4 75	
" 11.	By paid sundry fr'ght bill.....	.....	1 85
" "	To cash of Miller, ac't ranch.....	20 50	
" 15.	By cash to J. W. Seymour.....	.....	25
" "	To check 821.....	150 00	
" 22.	" cash to Brown & House, labor, wool-house.....	2 00	
" "	120 wheat.....	1 20	

1885.		Dr.	Cr.
June 26.	By cash to J. K. Green	.....	5 00
" "	To check drawn by self	10 00	
413			
July 11.	To cash to self	10 00	
" 13.	" bill H. Lewis & Co., 7, 14, '85	3 00	
" 16.	By A. E. Barnes, storage on wool	.....	10 00
" "	" company, storage on wool	.....	10 00
" "	To cash collected of Jessa Brown	8 85	
" 23.	By cash to Lea Owsley	.....	20 00
" "	" " to R. B. Bigler	.....	20 25
" "	" " to L. Whittaker	.....	44 00
" "	" " to T. Whittaker	.....	22 50
" "	To " of Geo. Marth	7 50	
" 31.	" check	100 00	
Aug. 3.	" cash held out of wool	216 74	
" "	" " of Adams & Shilling	50 00	
" "	By ½ balance J. W. Kerr & Co. acc't	.....	40 00
Sept. 2.	To cash, poll tax	3 00	
" 22.	" " from ranch	55 75	
" "	" " self	10 00	
" 28.	" 300 old wheat	3 00	
" 30.	" 20 graham flour	45	
" "	By hauling flour	.....	25
Oct. 1.	To 10 pork	70	
" 19.	By cash fr'ght on flour	.....	25
414			
Oct. 27.	To cash of Jesse Lee ranch	2 00	
" "	" " Hilliard trip	20 00	
Nov. 2.	" Geo. Marth, ranch bill coll	7 50	
" 13.	By bill, expenses to Hilliard	.....	11 70
" 27.	" hauling mill stuff	.....	4 50
" "	To 100 flour	2 00	
" "	" 80 shorts	80	
" "	" 735 bran	5 85	
" 30.	" cash coll. of Roche & Foxby	50 00	
Dec. 10.	" 400 bran	3 20	
" "	" 100 flour	2 00	
" "	" chopping 4,150 barley	5 20	
" "	" H. Clawson, bill coll	37 00	
" "	By cash to Lea Owsley	.....	33 50
" "	" chopping 4,150 barley, D. P. Tarkey	.....	5 20
" 31.	To 10 sausage	1 00	
" "	" 16 lard	1 60	
" "	" cash coll. of Adams & Shilling	5 00	
" "	" 160 bran	1 25	
" "	By hauling 3 loads flour	.....	75
1886.			
Jan. 2.	To 50 beef	3 00	
" 4.	" cash collected on note, P. Harlan	40 00	

415

1886.		Dr.	Cr.
Jan. 6.	To 50 bran	40	
" 11.	" 10 sausage	1 00	
" "	" cash collected of J. Lewis	18 50	
" "	By cash, to Lea Owsly	.....	20 00
" "	" " C. Cleason	.....	10 00
" 13.	To 80 bran	72	
" 21.	" 100 flour	2 00	
" 25.	" 45 lard	5 65	
" 28.	" H. House, bill, Jan. 1, '86	6 65	
" 30.	" 90 bran	72	
Feb. 9.	" 120 wheat	1 20	
" 11.	" 1,090 bran	7 60	
" "	By paid fr't on bran	.....	18 70
" 25.	" " bill straw Feb. 24, '86	.....	1 50
" "	" hauling 6 loads mill stuff	.....	1 50
" "	To 240 bran	1 68	
" 26.	" 12 sausage	1 20	
" "	" 74 leaf lard	7 40	
" 27.	By hauling 2 loads	.....	50
M'ch 4.	To 10½ sausage	1 05	
" 9.	" 450 bran	3 60	
" "	" 100 flour	2 00	
" 12.	" 7 sausage	70	
" "	" P. O. Holengren, bill smithing, March 1, '86	12 55	
M'ch 12.	To J. W. Guthrie, bill, March 1, '86.	2 00	

416

M'ch 12.	To cash, for pelts sold	5 00	
" 24.	" 980 bran	7 85	
" "	" 170 wheat	1 70	
" "	" 100 flour	2 00	
" 29.	" 100 bran	80	
" "	By J. T. Pitt, sleeve buttons	.....	2 50
" 31.	" W. L. Pickard, Salt Lake ex	.....	45 50
Apr. 7.	To 730 bran	5 84	
" 10.	" E. M. Shilling, ranch bill collected	38 50	
" "	By E. M. Shilling, ranch bill collected	.....	38 50
" 24.	To 70 wheat	70	
" 26.	" P. O. Holengren, bill smithing	50	
Apr. 30.	" J. W. Guthrie, bill April 30, '86.	2 00	
May 10.	To fr't on bran	15 00	
" 13.	" cash of Lea Owsley	40 00	
" "	" part check 844, acc't mine	50 12	
" 15.	" 4 wool sacks	1 80	
" "	By cash to Peralto	.....	22 50
" 19.	" 200 bran	.....	1 50

1885.		Dr.	Cr.
June 26.	By cash to J. K. Green	.....	5 00
" "	To check drawn by self	10 00	
413			
July 11.	To cash to self	10 00	
" 13.	" bill H. Lewis & Co., 7, 14, '85	3 00	
" 16.	By A. E. Barnes, storage on wool	.....	10 00
" " "	company, storage on wool	.....	10 00
" "	To cash collected of Jessa Brown	8 85	
" 23.	By cash to Lea Owsley	.....	20 00
" " "	" to R. B. Bigler	.....	20 25
" " "	" to L. Whittaker	.....	44 00
" " "	" to T. Whittaker	.....	22 50
" " To	" of Geo. Marth	7 50	
" 31.	" check	100 00	
Aug. 3.	" cash held out of wool	216 74	
" " "	" of Adams & Shilling	50 00	
" " By	½ balance J. W. Kerr & Co. acc't	.....	40 00
Sept. 2.	To cash, poll tax	3 00	
" 22.	" " from ranch	55 75	
" " "	" self	10 00	
" 28.	" 300 old wheat	3 00	
" 30.	" 20 graham flour	45	
" "	By hauling flour	.....	25
Oct. 1.	To 10 pork	70	
" 19.	By cash fr'ght on flour	.....	25
414			
Oct. 27.	To cash of Jesse Lee ranch	2 00	
" " "	" Hilliard trip	20 00	
Nov. 2.	" Geo. Marth, ranch bill coll	7 50	
" 13.	By bill, expenses to Hilliard	.....	11 70
" 27.	" hauling mill stuff	.....	4 50
" "	To 100 flour	2 00	
" " "	80 shorts	80	
" " "	735 bran	5 85	
" 30.	" cash coll. of Roche & Foxby	50 00	
Dec. 10.	" 400 bran	3 20	
" " "	100 flour	2 00	
" " "	chopping 4,150 barley	5 20	
" " "	H. Clawson, bill coll	37 00	
" "	By cash to Lea Owsley	.....	33 50
" " "	chopping 4,150 barley, D. P. Tarkey	.....	5 20
" 31.	To 10 sausage	1 00	
" " "	16 lard	1 60	
" " "	cash coll. of Adams & Shilling	5 00	
" " "	160 bran	1 25	
" "	By hauling 3 loads flour	.....	75
1886.			
Jan. 2.	To 50 beef	3 00	
" 4.	" cash collected on note, P. Harlan	40 00	

415

1886.		Dr.	Cr.
Jan. 6.	To 50 bran	40	
" 11.	" 10 sausage	1 00	
" "	" cash collected of J. Lewis	18 50	
" "	By cash, to Lea Owsly		20 00
" "	" " C. Cleason		10 00
" 13.	To 80 bran	72	
" 21.	" 100 flour	2 00	
" 25.	" 45 lard	5 65	
" 28.	" H. House, bill, Jan. 1, '86	6 65	
" 30.	" 90 bran	72	
Feb. 9.	" 120 wheat	1 20	
" 11.	" 1,090 bran	7 60	
" "	By paid fr't on bran		18 70
" 25.	" " bill straw Feb. 24, '86		1 50
" "	" hauling 6 loads mill stuff		1 50
" "	To 240 bran	1 68	
" 26.	" 12 sausage	1 20	
" "	" 74 leaf lard	7 40	
" 27.	By hauling 2 loads		50
M'ch 4.	To 10½ sausage	1 05	
" 9.	" 450 bran	3 60	
" "	" 100 flour	2 00	
" 12.	" 7 sausage	70	
" "	" P. O. Holengren, bill smithing, March 1, '86	12 55	
M'ch 12.	To J. W. Guthrie, bill, March 1, '86.	2 00	

416

M'ch 12.	To cash, for pelts sold	5 00	
" 24.	" 980 bran	7 85	
" "	" 170 wheat	1 70	
" "	" 100 flour	2 00	
" 29.	" 100 bran	80	
" "	By J. T. Pitt, sleeve buttons		2 50
" 31.	" W. L. Pickard, Salt Lake ex		45 50
Apr. 7.	To 730 bran	5 84	
" 10.	" E. M. Shilling, ranch bill collected	38 50	
" "	By E. M. Shilling, ranch bill collected		38 50
" 24.	To 70 wheat	70	
" 26.	" P. O. Holengren, bill smithing.	50	
Apr. 30.	" J. W. Guthrie, bill April 30, '86.	2 00	
May 10.	To fr't on bran	15 00	
" 13.	" cash of Lea Owsley	40 00	
" "	" part check 844, acc't mine	50 12	
" 15.	" 4 wool sacks	1 80	
" "	By cash to Peralto		22 50
" 19.	" 200 bran		1 50

		Dr.	Cr.
1886.			
May 19.	To 120 wheat	1 30	
" "	" J. W. Kerr, check on W. F. & Co	100 00	
May 19.	To cash fare of Brooks	2 25	
417			
1885.			
May 26.	To 5 mutton	35	
June 7.	" 10 "	60	
" 8.	By C. Okason, tobacco		1 00
" 14.	To 200 wheat	2 00	
" 21.	By cash acc't driving cattle		24 00
" 22.	" " J. K. Green to Salt Lake		20 00
June 22.	To cash held out of sheep money	348 00	
June 23.	To J. W. Kerr check on W. F. & Co	1,700 00	
June 23.	To cash acc't White & Sons	24 00	
June 23.	By bill of expenses Salt Lake		21 60
June 23.	By bill of sundries		1,782 12
" "	" cash to T. Jenkins		20 00
" "	" C. Okason 1 bridle bitt		5 00
" 25.	To 20 mutton	1 60	
" 28.	" cash collected on dip: sheep	8 50	
June 30.	To 100 flour	2 00	
July 15.	" cash bal. on Rosbor- draft	3 65	
July 19.	To 300 wheat	3 00	
" 26.	" J. W. Kerr check 98, acc't J. E. Dooley	413 00	
418			
1886.			
July 26.	To J. W. Kerr check 111	150 00	
" 29.	By 5 per cent. on land sold cash payments:		
	S. F. Walker 13,328 00		666 00
	W. H. Miller 780 00		39 00
	J. W. Hess 567 60		28 38
	J. S. Dudley 604 90		30 25
	P. O. Holengren 293 00		14 65
Aug. 9.	By cash for McNutt, stable bill		5 25
Aug. 16.	By J. W. Kerr water bill		5 75
" 23.	To 200 wheat	2 00	
Aug. 27.	To cash for bill Mrs. Topouce	4 40	
Sept. 8.	To 100 flour	2 00	
" 8.	" 150 wheat	1 50	
" 9.	By cash to T. Jenkins		10 00
" 24.	To 8 mutton	80	
" 24.	" cash to J. H. Toponce & Co	15 00	
" 27.	By bill expense to Hilliard 9, 26		16 00
Oct. 19.	To 120 wheat	1 20	
" 30.	" 500 flour to H. Hart	8 75	

1886.		Dr.	Cr.
Oct. 30.	To paid balance on rent of store-house	28 95	
" 30.	" sundries charged stable acc't in error	258 60	
419			
Nov. 10.	By H. P. Peterson balance acc't	.....	9 60
" 10.	To P. A. Holingren bill smithing Nov. 1, '86	1 95	
" 12.	" 575 chop wheat	6 30	
" 12.	" 200 bran	1 50	
" 27.	" cash from sale of bucks	52 50	
" 30.	" 600 chop feed	4 20	
" 30.	" 500 bran	3 75	
Dec. 1.	" J. W. Kerr check 229 on W. F. & Co.	100 00	
" 1.	" Rran & Brewster ranch bill collected	279 25	
" 28.	" 1,600 chop wheat	19 20	
" 28.	" 555 bran	4 45	
" 31.	" J. Rahn ranch bill call	15 00	
" 31.	By cash to T. W. Clancy	.....	50 00
" 31.	" cash to E. R. Hadly	.....	53 70
" 31.	To J. W. Gutherie bill Dec. —	1 00	
	By balance to	.....	1,291 45
		$15,548 04	$15,548 04
1887.			
Jan. 1.	To balance from ac't bro'ght down	1,291 45	
" 14.	" H. D. Pierson first payment and inter't on land	78 20	
" 11.	" 1,400 bran	9 60	
420			
" 11.	" 800 chop feed	9 60	
" 11.	" 50 flour	1 00	
" 14.	By cattle from Pierson acc't land	.....	78 20
" 22.	To cash of Sanford	98 00	
" 22.	" P. Herlan 27¼ tea	10 25	
Feb. 7.	" cash of W. H. Boothe	8 00	
" 7.	" H. C. House five loads hay	11 25	
" 17.	" J. A. Kramer labor	4 00	
" 24.	" 500 flour to Mrs. Lee	9 25	
M'ch 2.	" 280 wheat	3 50	
" 2.	" 200 bran	1 60	
" 4.	" 220 bran	1 75	
" 17.	" 245 bran	1 95	
" 26.	" cash collected of A. Kuhn	62 75	
" 26.	By hotel bill C. P. Groot Salt Lake	.....	1 25
" 26.	" hotel bill E. E. Spencer Salt Lake	.....	1 25

1887.		Dr.	Cr.
M'ch 26.	To 590 bran	4 70	
" 30.	" 315 bran	2 50	
" 30.	" 25 flour	50	
Apr. 6.	To bill hay for barn	9 40	
" 6.	" check from J. W. Kerr	50 00	
" 11.	" cash collected from White & Sons	162 40	
" 11.	By bill of B. & S.	.....	80 00
" 11.	" bill expenses to Hilliard	.....	20 00

421

1886.			
Jan. 12.	To 345 bran	2 76	
" 18.	" T. C. Holingren bill 3, 23, '87.	19 75	
" 23.	" 410 bran	3 30	
" 23.	" 450 chop wheat	5 60	
May 3.	By cash to McIntyre	.....	4 75
" 9.	To 251 chop wheat	3 14	
" 9.	" 170 bran	1 36	
" 13.	By cash to N. Wolverton	.....	20 00
" 13.	" cash to S. Veneoh, cook	.....	16 80
" 16.	To freight on saddle	25	
" 16.	" 1,000 flour Mrs. Greenwald	18 50	
" 19.	By bill expenses sheep sold to Yount	.....	4 75
" 23.	" bill Lain & Co. 5, 20, '87	.....	4 50
" 23.	To 253 chop wheat	3 15	
" 23.	By bal. acc't Mrs. H. Toponce	.....	7 60
June 1.	To cash to Lea Owsley	10 00	
" 1.	By Lea Owsley cash to Chase	.....	12 50
" 11.	To 323 chop wheat	4 04	
" 15.	By cash to R. B. Bigler	.....	10 00
" 30.	" bill oats for Errick	.....	13 35
" 30.	To cash collected of N. Ireland	25 00	
July 1.	" J. W. Guthrie bill 6, 30	19 50	
21.	To 300 bran	2 70	

422

1887.			
Aug. 3.	By cash to C. P. Grood	.....	4 00
6.	To J. W. Guthrie, bill, 8, 11, '87	5 05	
	" cash, acc't bucks	10 00	
Sept. 9.	" Geo. Marth, ranch bill, coll.	10 00	
19.	" check 980	15 00	
26.	By J. A. Bigler, bill against McIntyre	.....	19 65
Oct. 1.	By hay for bucks	.....	2 00
8.	To E. R. Hadley, bill coll.	3 50	
Nov. 12.	By bill of expenses on bucks	.....	22 00

		Dr.	Cr.
1887.			
Nov. 21.	To H. House, bill.....	22 40	
30.	" bill Houts & Conant, coll.	*20 00	
1888.			
Feb. 10.	To H. House bill.....	92 97	
Ap'l 30.	" J. W. Kerr, for paid costs in suit of C. Luce *vs.* C. M., C. & S. Co., and to perfect appeal.	†15 00	
June 10.	To J. W. Kerr, paid board of mare at Ogden	†15 00	
	Cash held out on sale of 5 horses in 1887	‡200 00	
	Cash of Thos. Smart, ac't buck sold.....	‡130 00	
423	Cash of J. Miller, acc't buck sold	‡330 00	
	A. Kuhn, for am't paid C. C. Luce for breaking stallion "Aleck".....	†123 75	
	Cash drawn from Deseret Nat'l b'k as manager without authority.....	888 74	
	700 wool sold to G. W. Carleton, in 1886, @ 15c. per pound..	‡105 00	
	Balance due C. M., C. & S. Co..	.....	3,614 51
		$3,937 11	$3,937 11

EXHIBIT 23.

No. —. SALT LAKE CITY, UTAH, *Nov.* 1, 1887.

The Deseret National bank, pay to John W. Kerr, pres't C. M., C. & S. Co., or order, twenty-four hundred, sixty-three and $\frac{70}{100}$ dollars, ($2,463.70).

J. K. FOWLER,
Sec'y C. M., C. & S. Co.

Endorsed: JNO. W. KERR, *Pres.*

Received Nov. 1, '89, the amount of the within check, and I guarantee the check to be correctly drawn and genuine; and I guarantee the Deseret National Bank, of Salt Lake City, against loss in paying the same.

JNO. W. KERR.

424 EXHIBIT 23 A.

Directors' Meeting.

At a meeting held by the directors of the Corinne Mill, Canal & Stock Company, at the office of said company in Corinne, Box Elder

*Admitted to here.
† Disputed.
‡ Admitted.

county, Utah, on the 17th day of February, 1883, a full board was present, and on motion and seconded, and after consideration, the following by-laws were unanimously adopted, to wit:

By-laws of the Corinne Mill, Canal and Stock Company of Utah.

Article I. The board of directors shall have and exercise all the power usually had by boards of directors of business corporations, and shall determine and fix the compensation of all officers of the company, and shall have power to remove any officer for cause and fill any vacancy in office, and their appointee shall hold office until the next subsequent annual election, or until otherwise ordered by said board. They shall also have power through the president to call special meetings of the board, or of the stockholders when they deem it for the interest of the company; or upon the request of any person or persons holding one-third of all the capital stock of said company, as provided in article II of these by-laws; and generally, shall have supervision over all the business affairs of said company.

Article II. All special meetings of the stockholders shall be called by a notice stating the purpose of the meeting, to be published in a newspaper, printed in the English language at Salt Lake City, Utah, daily for two successive weeks next preceeding the date of the meeting.

Article 3. The president shall preside at all meetings of the stockholders and directors, and in case of a tie shall have the casting vote.

Shall sign all certificates of stock, all contracts, and all other instruments of writing which have first been approved by the board, and shall also sign all checks and warrants for money in the absence of the secretary and treasurer, and generally do and perform such other duties as are incidental to his office and not in conflict with these by-laws and the articles of association.

In the absence of the president the vice-president shall act, and in the absence of both a president *pro tempore* shall be elected by and from the board of directors, who shall, for the time being be empowered to do and perform all the duties of the president.

Article IV. The secretary shall keep a record of all official proceedings of the board of directors, and stockholders in a book to be provided for that purpose.

The treasurer shall be custodian of all funds and official books and papers of the company, and make no payment, except on warrant or check signed by the president.

Shall keep a record of the same, and shall make monthly and annual reports to the board of directors, showing the general and detailed business and financial condition of the company, and shall do and perform such other duties as usually pertain to such an office and prescribed by the board of directors.

All official books and papers, in the office of the secretary and treasurer, shall be subject to inspection by any director of the company during business hours.

Article V. It shall be the duty of superintendent to take charge

of all the property belonging to the company, to control and direct, subject to the order of the board of directors, all labor and business pertaining to the interests of the company, at the ranch, mill, canal, store and herds of stock; to make monthly reports of all persons employed, and their wages; and a statement of all expenditures shall accompany such reports with the necessary vouchers.

He shall also make a monthly report, upon blanks to be furnished him for the purpose, showing the general condition of the ranch, mill, canal and stock belonging to the company, and the work done on and at the same. Shall likewise report all tools, supplies and number of stock on hand, sold and dead.

Article VI. Certificates of stock shall be of such form and device as the board of directors may adopt. Each certificate shall be signed by the president or vice-president and secretary, and shall express on its face its number, date of issuance, and the number of shares for which and the name of the person to whom issued.

Sufficient shares of stock shall be withheld, as a guarantee for any indebtedness due said company by any shareholder.

The shares of said company may be transferred by the
427 holder thereof or by their legal representatives. Such transfer shall be made by indorsements on the certificates of stock and the surrender of the same; but such transfer shall only be valid between those two *two* until the same shall have been noted in proper form on the stock ledger of the company. The surrendered certificate shall be cancelled and presented by the secretary, and a new one issued in lieu thereof.

On motion of D. H. Spencer, in accordance with a proposition and bill rendered including about 12,400 sheep and lambs, 17 head of horses and mules, 1 boro, 7 wagons, together with tents, camp outfit, etc., were purchased from John W. Kerr for the sum of $80,000. Also 15 head of horses as per bill rendered for the sum of $2,575.

And from Alexander Toponce as per bill rendered 78 head of horses, 16 head of cattle, 6 head of hogs, and wagon, harness, saddle, etc., amounting to $9,657. Also from Mrs. Kate Toponce as per bill rendered 3 head of horses, amounting to $290. And from John H. Toponce, as per bill rendered 2 head of horses, amounting to $165.

JOHN W. KERR, *President.*
J. K. FOWLER, *Secretary.*

I hereby certify that the foregoing is a correct copy.
J. K. FOWLER, *Secretary.*

EXHIBIT 23 B.

At the regular annual meeting of the stockholders of the Corinne Mill, Canal & Stock Company, held at the office of the com-
428 pany at Corinne, Utah, on December 19, 1887, at 10 o'clock a. m., the following business was transacted, to wit:

Mr. John W. Kerr, the president, took the chair, and Mr. J. K. Fowler, the secretary, acted as secretary of the meeting.

Proof of due publication of the notice of the meeting was first read by the secretary and ordered filed, to wit:

Proof of Publication.

TERRITORY OF UTAH, }
County of Salt Lake, } ss:

Wm. W. Rivers, being first duly sworn, deposes and says that he is the chief clerk of the Salt Lake Tribune, a newspaper published in Salt Lake City, Salt Lake county, Utah Territory.

That the notice of stockholders' meeting of the Corinne Mill, Canal & Stock Company, of which a copy is hereto attached, was first published in said newspaper in its issue dated the 4th day of December, 1887, and was published in each daily issue of said newspaper for fourteen days thereafter, the full period of fifteen days, the last publication thereof being in the issue dated the 18th day of December, 1887.

WM. W. RIVERS.

Subscribed and sworn to before me this 19th day of December, 1887.

HOMER F. ROBINSON,
Notary Public.

The following stock was represented at the meeting by the owners thereof and their proxies, to wit:

429 John W. Kerr, owning 61,240 shares.
Tom D. Pitt, owning 1,875 shares.
James T. Pitt, owning 1,875 shares.
J. K. Fowler, owning 6 shares.
C. W. Bennett, owning 5 shares.
A. Toponce, by his proxy, J. N. Kimball, owning 50,000 shares.
Total, 115,001 shares.

By request of A. Toponce the meeting was held open until 12 o'clock m.

On motion of C. W. Bennett the minutes of the directors' meeting just read by the secretary, embracing all the meetings from February 17, 1883, to November 8, 1887, were adopted, ratified and approved.

The accounts of the company, as they appear on the company's books, written up to and including the 30th day of September, 1887, *was* submitted to the meeting by the secretary and treasurer, and the meeting went into a committee of the whole for the purpose of examining and auditing said accounts, and after such examination and audit and some discussion, the following resolution was passed by a majority vote of all stockholders present, 65,001 shares voting for and 50,000 shares voting against its passage, to wit:

Resolved, That each and all the accounts of this company, as they now appear on the company's account books, be, and they are hereby ratified, approved and confirmed in all respects, items and details, and declared accurate and correct.

Previous to the above vote being cast, J. N. Kimball, proxy for A. Toponce, made the following protest, viz:

A. Toponce, by J. H. Kimball, his proxy, objected to John W. Kerr voting at the meeting more than 50,000 shares of stock and protested against his voting more than that number of shares on the ground that the 1,500 shares of trust stock heretofore issued to said Kerr were improperly, wrongfully and without authority issued to him.

On motion duly seconded, the following resolution was unanimously adopted, to wit:

Resolved, That articles I and II of the by-laws of the company be, and the same are hereby repealed and annulled, and the following articles I and II are enacted and substituted in lieu thereof, to wit:

Article I. The board of directors shall have and exercise all the powers usually had by boards of directors of business corporations and shall determine and fix the compensation of all officers of the company, and shall have power to remove any officer for cause, and fill any vacancy in office, and their appointee shall hold office until the next subsequent election, or until otherwise ordered by said board.

Article II. The president shall call all special meetings of the board of directors, and of the stockholders, at such times as he may think proper, and also upon the request of the holder or holders of one-third of all the capital stock. Five days' notice of the time and place of special directors' meetings shall be by the president given to each director personally or by mail, postpaid and addressed, unless the directors meet without notice.

Notice of the time, place and object of special stockholders' meetings to be held for the purposes specified in sections 7 and 8 of subchapter I of chapter XLV, Laws of Utah, approved March 13, 1884, shall be by the president caused to be published for the length of time required by said sections 7 and 8 respectively in some newspaper printed in the English language in Utah, and having a general circulation in Box Elder county, Utah. Notice of the time, place and object of all other special stockholders' meetings shall be by the president caused to be published for ten days next preceding the date of the meeting in some newspaper printed in English in Utah and having general circulation in Box Elder county, Utah.

On motion duly seconded, the meeting proceeded to vote by ballot for directors and officers of the company for the ensuing year, those present being entitled to cast and casting a vote for each share of stock by them held.

The vote was as follows:

For directors: John W. Kerr received 115,001 votes.

C. W. Bennett received 65,001 votes.

J. K. Fowler received 115,001 votes.

Tom D. Pitt received 65,001 votes.

James T. Pitt received 65,001 votes.

A. Toponce received 50,000 votes.

Ira H. Fowler received 50,000 votes.

D. H. Spencer received 50,000 votes.
For president, John W. Kerr received 115,001 votes.
For vice-president, C. W. Bennett received 64,996 votes.
For treasurer, J. K. Fowler received 115,001 votes.
For secretary, J. K. Fowler received 115,001 votes.
On motion, duly seconded, the meeting adjourned till the third Monday in January, 1888, at one o'clock p. m. of that day, at the company's office in Corinne, Box Elder county, Utah.

(Signed) JOHN W. KERR, *President.*

Attest: J. K. FOWLER, *Secretary.*

I hereby certify that the foregoing is a true and correct copy of the minutes of the stockholders' annual meeting of the Corinne Mill, Canal & Stock Company, held at the office of said company in Corinne, Utah, December 19, 1887, and now of record in my office.

J. K. FOWLER,
Secretary C. M., C. & S. Co.

EXHIBIT 24.

CORINNE, UTAH, *March* 7, 1883.

Corinne Mill, Canal and Stock Company to Alex. Toponce,
433 wholesale grocers, Guthrie's brick block, opposite Central hotel, Montana street, for one and one-half tons hay at $10—$15.

Received payment, ALEX. TOPONCE.

Endorsed: Horse, cattle, acc't March 7, 1883, D. B. 158, No. 5.

Attached:

No. 61. CORINNE, UTAH, *March* 7, 1883.

Banking-house of J. W. Guthrie, pay to the order of A. Toponce, for one and one-half tons of hay, fifteen ($15) dollars.

J. K. FOWLER,
Secretary C. M., C. & S. Co.

Endorsed: A. TOPONCE.

EXHIBIT 25.

No. 30. CORINNE, UTAH, *April* 5, 1883.

Received from Corinne Mill, Canal & Stock Co., forty-five ($45) dollars, for expenses to Salt Lake, account land.

Endorsed: A. TOPONCE.

Real estate, c'k 158, April 25, '83. D. B. 197.

EXHIBIT 26.

No. 103. CORINNE, UTAH, *June* 7, 1883.

Received from Corinne Mill, Canal & Stock Co., three and thirty-five one-hundredths ($3.35) dollars, for expenses to Cache valley to see about stallion.

Endorsed: A. TOPONCE.

Ranch account, cash, June 7, '83. D. B. 246.

EXHIBIT 27.

CORINNE, *July* 15, 1884.

Corinne Mill, Canal & Stock Co. to Alex. Toponce, Dr.

June 20. For expenses on trip to Salt Lake, railroad fare and meals..... $7 50

434

July 13. Fare, meals, etc..... 20 00

$27 50

Endorsed: A. TOPONCE.

Real estate, July 15, 1884.

EXHIBIT 28.

CORINNE, *December* 17, 1884.

Corinne Mill, Canal & Stock Co. to Alex. Toponce, Dr.

Paid expenses on bucks at Brigham City..... $3 50

Received payment.

Endorsed: A. TOPONCE.

Sheep account, December, 16, 1884. Inn. 276.

EXHIBIT 29.

CORINNE, *July* 11, 1885.

C. M., C. & *Mill* Co. to A. Toponce, Dr.

For amount paid for water bucket..... $1

Received payment.

Endorsed: A. TOPONCE.

Stable account, July 11, '85. Iv. 352.

EXHIBIT 30.

CORINNE, *Sept.* 22, 1885.

C. M., C. & Stock Co. to A. Toponce, Dr.

Expenses to Steed's sheep camp, after bucks..... $1 50

Received payment.

Endorsed: A. TOPONCE.

Sheep account, September 9, '85. Iv. 344.

EXHIBIT 31.

No. 851. CORINNE, UTAH, *June* 1, 1886.

J. W. Guthrie, banker, pay to the order of A. Toponce ac-
435 count D. Thorp, order for labor, eight and twenty-five one-hundredths ($8.25) dollars.

J. K. FOWLER, *Secretary.*

Countersigned:

JOHN W. KERR, *President.*

Endorsed: A. TOPONCE.

EXHIBIT 32.

CORINNE, *June* 14, 1886.

C. M., C. & S. Co., to A. Toponce, Dr., for amount paid One-eyed Riley on sheep corral, $7.00; on order, $2.50; total, $9.50.

Endorsed: A. TOPONCE.

Sheep account, 6, 14, '86. IV. 421.

Attached:

TOPONCE CORREL, *June* 14, 1886.

Mr. Toponce,

SIR: Please pay the bearer two dollars and fifty cents ($2.50) for wood.

S. W. JENKINS.

Attached:

No. 865. CORINNE, UTAH, *June* 14, 1886.

J. W. Guthrie, banker, pay to the order of A. Toponce, account sheep corral, nine and fifty one-hundredths ($9.50) dollars.

J. K. FOWLER, *Secretary.*

Endorsed: A. TOPONCE.

EXHIBIT 33.

No. 957. CORINNE, UTAH, *August* 1, 1887.

J. W. Guthrie, banker, pay to the order of A. Toponce, account bal. on wool, twenty ($20) dollars.

Endorsed: A. TOPONCE.

J. K. FOWLER, *Secretary.*

436 EXHIBIT 34.

Received July 11, 1885, from A. Toponce, $50, account of professional business of Corinne Mill, Canal & Stock Co.

Endorsed: DICKSON VARIAN.

Suits of law, July 13, '85. Iv. 335.

EXHIBIT 35.

$14,672 50. SALT LAKE CITY, UTAH, *January* 1, 1883.

Wells, Fargo & Co.'s bank, Salt Lake City, Utah, pay to J. E. Dooly, for A. Toponce, note for $13,310 and interest, $1,362.50, or order, fourteen thousand six hundred seventy-two $\frac{50}{100}$ dollars.

No. 365. JNO. W. KERR & CO.

Endorsed: J. E. DOOLY.

The foregoing, with the exhibits, is all the evidence given on the trial.

The defendant requested the court to give the following special instructions to the jury:

Plaintiff cannot recover from defendant in this action any sum or sums paid or laid out or expended by him for defendant prior to June 9, 1886; all such sums, and the cause of action to recover same, are barred by paragraph 1, section 196, of the Code of Civil Procedure, and you must disregard any such sums and all evidence relating to their payment.

Refused.

H. P. HENDERSON.

2. The cause of action for any and all services done or performed by plaintiff for defendant prior to June 9, 1886, is
437 barred by paragraph 1 of section 196 of Code of Civil Procedure, and plaintiff cannot recover of defendant in this action the value of, or any sum for such services, and you must disregard any and all such services and all evidence relating to their payment.

Refused.

H. P. HENDERSON.

3. If, from the evidence, you find that any of the sums of money in the first cause of action alleged were paid, laid out or expended by plaintiff, prior to June 9, 1886, then you must not, in determining on your verdict, find any of those sums for plaintiff or give him the benefit of same in your verdict; for any and all such sums paid out prior to June 9, 1886, are barred by paragraph 1 of section 196 of the Code of Civil Procedure, and plaintiff cannot in this action recover them from defendant therefor, or any part thereof.

Refused.

H. P. HENDERSON.

4. If you find from the evidence that any of the service- in the third cause of action alleged were done and performed by plaintiff prior to June 9, 1886, then you must not find the worth of value of any such services for plaintiff, or give him the benefit of same in your verdict; the cause of action for any and all such services rendered prior to that date, is barred by paragraph 1 of section 196 of Code of Civil Procedure, and plaintiff cannot recover their worth or value from defendant, in this action or any part thereof.

Refused.

H. P. HENDERSON.

5. If you find from the evidence that, during the period
438 or any portion of the period of time alleged in the third cause of action, the plaintiff was an officer or director of defendant company, and that while he was such officer or director he did or performed for defendant any of the services alleged, then you are instructed that the law presumes such services were done by him as officer or director and that he cannot recover for same of defendant.

Refused except as given in general charge.

H. P. HENDERSON.

6. If from the evidence you find that during the period, or any part of the period alleged in the third cause of action, the plaintiff was an officer or director of the defendant company, and that while he was such officer or director he did or performed for defendant any of the services alleged, then you are instructed that the law presumes such services were done by him as director or officer, and under and by virtue of his office and in pursuance of his duties as director or officer, and that he cannot recover for the same from defendant in the absence of an express understanding or agreement between him and the defendant that he should be paid for the same; and to rebut this presumption the burden of proving such an understanding or agreement is on plaintiff, and he must show it by clear and convincing proof preponderating in his favor.

Refused except as given in the general charge.

H. P. HENDERSON.

7. If from the evidence you find that during the period or
439 any part of the period alleged in the third cause of action, the plaintiff was an officer or director of defendant company,

and that while he was such officer or director he did or performed for defendant any of the services alleged, then you are instructed that the law presumes such services were done by him as director or officer, and under and by virtue of his office and in pursuance of his duties as officer and director, and that he cannot recover for same from defendant unless he proves to your satisfaction by the preponderance of the evidence, either (1) that there was an express understanding or agreement between him and defendant, that he should be paid for same, or (2) that the services performed while he was director were clearly outside of the line of duty to defendant, as an officer or director; the burden of proving such an understanding, or that the services were outside of his duties as officer or director, is on plaintiff.

Refused except as given in the general charge.

H. P. HENDERSON.

7½. If you find from the evidence that while plaintiff was an officer or director of defendant he did or performed the services alleged and that (whether or not) the services were clearly and unmistakably outside of the line of his duty as such officer and director; then you are instructed that the law presumes he did the services gratuitously and without expectation of compensation and that to rebut this presumption the plaintiff must show either an express promise to pay for the services or facts from which the law will imply a promise to pay for same.

Refused except as given in general charge.

H. P. HENDERSON.

440 7¾. All services done by an officer or director for his company are by the law presumed to be gratuitous whether the services performed be within or without the line of his official duty toward his company.

Refused except as given in the general charge.

H. P. HENDERSON.

8. To entitle plaintiff to recover from defendant for any services he may have rendered defendant while he was an officer or director of defendant, plaintiff must establish by the preponderance of the evidence that there was either (1) an understanding or agreement between him and defendant that he should be paid for the same, or (2) that the services so performed were clearly outside of his duties as an officer or director. The burden of proof is on plaintiff to establish either one or the other of those two points, and if plaintiff has not proven to your satisfaction either of those points then your verdict as to such services should be for defendant.

Refused except as given in the general charge.

H. P. HENDERSON.

9. To recover the worth or value of any services done by plaintiff for defendant while he was an officer or director of defendant, the plaintiff must prove by the preponderance of the evidence that there was an understanding or agreement between him and defend-

ant that he should be paid therefor, and if you find from the evidence that no such understanding or agreement was had
441 then as to all such services your verdict must be for defendant, and you must not find their values or worth for plaintiff.

Refused except as given in general charge.

H. P. HENDERSON.

10. If you find that the mutual understanding of plaintiff and defendant, or its officers, was that plaintiff should donate his services to defendant, or that he should not be paid for his services alleged, then as to the services alleged your verdict must be for defendant.

Refused except as given in the general charge.

H. P. HENDERSON.

11. If you find from the evidence that any of the services which plaintiff testifies to as performed for defendant, were done by plaintiff while he was an officer or director, and within the scope of his duties as such officer or director of defendant company, then as to those services your verdict should be for defendant.

Refused, except as given in the general charge.

H. P. HENDERSON.

12. If you find from the evidence that plaintiff performed for defendant any of the services alleged in the third cause of action while he was a director or officer of the defendant, and that those services were within the scope of his duties as such officer or director, then you are instructed that the evidence is insufficient to warrant you in finding that defendant understood or agreed that plaintiff was to be paid for those services, and your verdict on those services should be for defendant.

Refused except as given in the general charge.

H. P. HENDERSON.

442 13. If you find from the evidence that plaintiff performed for defendant any of the services alleged in the third cause of action while he was an officer or director of defendant, and that those services were without the scope of his duties as such officer or director, and that plaintiff voluntarily undertook to perform them for defendant's benefit, without expectation of direct pay or compensation from defendant for the services, then your verdict should be for defendant.

Refused except as given in the general charge.

H. P. HENDERSON.

14. If you find from the evidence that plaintiff performed for defendant any of the services alleged in the third cause of action, voluntarily and wi-hout expectation of direct pay or compensation from defendant for the same, then as to such services your verdict must be for defendant.

Refused except as given in the general charge.

H. P. HENDERSON.

15. If you find that at or after the time of the incorporation of defendant, plaintiff understood or agreed with defendant, or its directors or officers, that he should render his services for defendant's benefit gratuitously, then you are instructed that the evidence is insufficient to warrant the finding of an express understanding or promise by defendant to pay plaintiff for those services, and your verdict should be for defendant on the third cause of action alleged.

Refused except as given in the general charge.

H. P. HENDERSON.

443 16. In determining whether or not plaintiff and defendant mutually understood that plaintiff was to be paid for the services alleged and referred to in the third cause of action, you should consider, in connection with the other evidence in the case, the evidence relating to any conversations which may have been had at or about the time of the incorporation of defendant and afterwards between John W. Kerr, the president and directors and other officers and directors of the company and the plaintiff the understanding on that matter of defendant and its officers and directors; the conduct and actions of plaintiff and defendant as relating to compensation for services; the fact whether or not plaintiff ever claimed from defendant prior to the institution of the suit any compensation for his services; the relations, if any, that plaintiff bore toward defendant as officer, director or otherwise; and generally all the evidence in the case which shows or tends to show the circumstances which surrounded the parties at the time of such incorporation and subsequently thereto, down to the time when the alleged services ceased. All evidence tending to prove those, and each of those matters, is admissible, competent and material, as bearing on the question of plaintiff's intention and understanding respecting and his right to recover for such services.

Refused except as given in the general charge.

H. P. HENDERSON.

444 17. On the evidence in the case relating to the third cause of action alleged in the complaint, your verdict on that cause of action should be for defendant.

Refused except as given in the general charge.

H. P. HENDERSON.

The court refused to give, and did not give, the first, second, third and fourth of said requests, and to the refusal to give each of said requests the defendant duly and separately excepted and excepts.

The court refused to give, and did not give either as requested or with modification, either or any of the instructions requested by defendant and numbered five, six, seven, seven and a half, seven and three-quarters, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen and seventeen; and to the refusal to give each of said requests, and to the failure to give each of said instructions either as requested or with modification, the defendant duly and separately excepted and now excepts, for the reason that the same correctly

state the law, were proper, and should have been given as asked or with modification in such manner that it might have distinctly appeared what instructions were given in whole or in part, or refused absolutely.

The court charged the jury as follows:

This is an action brought by the plaintiff to recover for various amounts claimed by him to be due from the defendant upon various causes of action, as he has stated them in his complaint. The complaint and answer have been read in your hearing, and it is unnecessary for me to read them again, but I shall call your
445 attention specifically to the different portions of it, and to each cause of action as set forth in it.

The plaintiff claims that the defendant is a corporation, and that he has furnished materials, done work, and has incurred expenses in its business, for which he claims the right to recover in this action. The incorporation of the defendant is admitted by the answer, so that you will have no trouble with that.

As a first cause of action the plaintiff claims that he has paid, laid out and expended for the defendant, at its request and about its business, divers sums of money, aggregating the sum of $4,882.23, and he claims the right to recover in this action for that, and along with that he has presented a bill of the items of which that sum is composed. I call your attention, in the first place, to that cause of action.

It appears from the testimony that the defendant was incorporated in 1883; that the plaintiff and one Mr. Kerr were the principal incorporators, others joining with them for the purpose of making up a board of directors; and that they engaged in business at or near Corinne, and the articles of incorporation have been put in evidence here, from which it appears that they carried on an extensive business at that place. The articles of incorporation I think have been read once in your hearing, but I call your attention to it in particular again:

"The business and the pursuit of this corporation shall be
446 to take up, purchase, use and sell water, water rights, water appropriations and powers, to buy, contract, operate, use and sell water flumes, canals, ditches, and other water-ways, to buy, improve, add water privileges to and sell agricultural lands; to use, sell and provide water for irrigation, mining, milling, manufacturing, stock and agricultural purposes; to transport by water-ways logs, timber and agricultural products; to buy, manufacture, sell lumber, merchandise, logs, agricultural products, including live stock; to construct, buy, operate, sell, improve ranches, manufacture water powers, canals and ditches, and establish and carry on a general merchandising business, and generally to buy, use and sell all kinds of property connected with or incident to the conduct of all such business; also to loan any moneys of the company on real or personal security, but business hereby authorized and contemplated may be carried on in any place or places in the United States." There is evidence tending to show that the company after its organization entered upon the various kinds of business men-

tioned in the articles, and it is claimed by the plaintiff that he became an active agent and operator in the conducting of this business; and that in the conduct of this business it became necessary for him, and he did, lay out and expend large sums of money for which he has never been reimbursed and for which he claims judgment on this cause of action.

A person, whether he be one of the incorporators or not,
447 who is engaged in its business with the knowledge and consent of the corporation, if he expend money necessarily in its business, and in conducting the part of the business over which he has charge, has the right to be reimbursed from the company. They are under obligations to repay to him such money as he has actually expended and laid out in their behalf, and which is necessary for him to expend to carry on their business.

In this case it appears from the articles of -corporation—and by the way, whatever it may be, whenever I state any evidence in this way, I only do it for the purpose of explaining what legal principle may be involved in them and not for the purpose of saying the evidence establishes this or that proposition, because that is wholly a question of fact—in the articles of incorporation which have been put in evidence, if you find them to be the articles of incorporation, it provides as follows:

Article 14. The board of directors may make by-laws for the regulation and government of the business and affairs of the corporation. These articles of incorporation, if you should find them to be such, have all the force of a contract if executed by the plaintiff with his co-incorporators, and he is bound by their terms and should fulfill them, and should see that these are enforced, and he, as well as the other parties, are charged with the enforcement of them. The articles to which I have just called your attention, provide the board of directors may make by-laws for the conduct
448 of the business by them. The evidence which has been given has a tendency to show that certain by-laws were adopted, and among them is the following in article 4:

"The treasurer shall be custodian of all funds and official books and papers of the company, and make no payment except on warrant or check signed by the president.

Shall keep a record of the same, and shall make monthly and annual reports to the board of directors showing the general and detailed business and financial condition of the company, and shall do and perform such other duties as usually pertain to such an office and prescribed by the board of directors."

I call your attention to this by-law which there is evidence here tending to show was adopted by the company in pursuance to the article of incorporation providing for them, and I call your attention to it because in determining this cause of action (and indeed all others) reference should be had to the duties that were assumed by each and every incorporator of this company in the management of its business. It is claimed, as I said before, by the plaintiff that he has expended sums and paid out sums of money for which he claims the right to recover in this cause of action, and in deter-

mining this action you should, in the first place, determine whether he has actually expended the money that he claims to have expended. If he has, then the obligation, as I said before, would be raised in his behalf as against the company for repayment and they should repay him. If you should find that as matter of fact that he has laid out and expended money in the business of the concern and he has made monthly or other reports to the company claiming compensation for like expenditures, then it is his duty to show to you clearly that the sum- for which he claims compensation under this cause of action are not such as he has already been paid for, remembering his duty stated in these articles of incorporation, if they are the articles and by-laws of this incorporation to make proper and periodical reports of expenditures, he has made for the reasonable and ordinary conduct of the business. I call your attention to one item which is charged in this cause of action for $1,300 which is claimed as one of the items in this cause of action for what is said to be expended in traveling from February 1, 1883, to December 1, 1887. Of course if the plaintiff was engaged in transacting business for the company with their knowledge and understanding, and it was necessary for him to incur traveling expenses, such actual expenses they would be indebted to him for, but they are indebted to him only for the amount he actually expended; they are not indebted to him for averages upon that account; they are not indebted to him for estimates of that account. If there are by-laws which provide that the account shall be returned at certain times, then when an account is returned by him under their provision then that would bind the company under the articles of incorporation; but if he presented not an itemized account, but an averaged account covering a long period of time and for which he has never presented any account before that time, it is his duty in the first place, before he can recover it, to show some excuse for not having presented it before; something which in your good judgment as reasonable men and as business men you will regard as a good excuse for not having presented and stated to the company the items of this expense before. He should also show, before he can recover for such account, some reason for not presenting the items of that expense, instead of averaging the expenses he has made. If there is some good reason, one that will be accepted by you as a good business reason, then it will become a question of fact for you to determine whether he has expended this amount of money, and if he has, whether he has been repaid any portion of it; and I call your attention to what I said a moment ago in relation to this, and if it be found he has presented in the meantime accounts for traveling expenses, which have been allowed—then it must be clearly shown to you before any portion of this be admitted or allowed in this account, that these are true expenses above what he has been allowed. It is claimed by the defendant that in relation to some of these actions that there was an express understanding, or if not an express understanding, an implied one between the plaintiff and the company that as to some of

these matters that the plaintiff was to bear them himself, and was to take the benefit of the enterprise he was
451 engaged in, for instance, the prosecution of certain suits which it is said he was to prosecute at his own expense, and was to have the revenue from them, and that therefore they were not intended to be charged against the company. Now, if you should find, as a matter of fact, that that was so understood, that that was the express understanding, or was the implied understanding between him and the company, then he could not charge for such items; that would be his own account, and in determining that question as to whether he intended to make the charge for it or was conducting it on his own behalf, you should consider whether he has ever presented an account to the company and all the circumstances of the case, and determine whether they are charges against the company and determine whether they were expenditures by him, and whether it was understood by him that it should be a charge against them; and in the next place whether he has been paid for that and as to the item of thirteen hundred dollars; whether he has shown any good excuse for not presenting his claims before, and determine how much, if any, of these items is due to him under this cause of action and when you have determined the amount, if you should determine there is anything his due upon that amount, then he will be entitled to interest not from the time he has expended this money but from the time he has asked the company to repay it.

If an agent expends money for his principal, or an officer, or
452 an incorporator of an incorporated company expends money for the principal and never reports it to him they cannot recover interest upon it till it is reported and a demand is made; consequently in this case, if you should find there is anything due the plaintiff but that he never made demand of payment for it till he brought this action (and this action is in itself a demand) then you should give interest from the time this suit was commenced to the present and add that to it. Such sums as have been expended by him and have not been paid him he should have interest on from the time the demand was made and that amount so found and the interest added to it would constitute the amount due upon the first cause of action, if anything. If you should find that there is nothing due you would have no further difficulty with the first cause of action.

* * * * * * *

The second cause of action for which plaintiff claims the right to recover in this action is that the defendant is indebted to him in the sum of $1,133.25 upon an account for feeding, caring for and keeping the horses and stock of the defendant at its request. The claim of the plaintiff is that in the business he transacted for the defendant by its request and consent that he had charge of certain stock and that he cared for it and expended certain sums of money in keeping it, or rather for its keeping, and he claims the right in this action to recover for it. In determining this cause of action

you should remember this principle, that no agent, whether
453 he is an officer of an incorporation or is an incorporator working for it, or is an agent merely for the corporation, can deal with himself. No agent who is entrusted with a sale by the principal can purchase the property for himself; no agent entrusted with the care and keeping of stock can contract with himself for the keeping of that stock, and thus bind his principal for the amount which he thus contracts for. You should bear in mind that the principal is liable for whatever the agent has to expend actually in the care and custody of the property, or possibly in the case of an emergency he would have the right to render extraordinary services and *and* receive pay for that, but he cannot contract with himself. If he has charge of a band of cattle or stock for his principal, and it is necessary that it should be cared for, he cannot contract with himself for the keeping of the stock, because he would be dealing on both sides of that transaction, and it would be a legal fraud. He can only charge what he has actually expended in money for hay and grain, and for keeping, and in determining that you will apply that principle to it, that the plaintiff in this case cannot recover upon any such contract if it were made with himself. If it became necessary to make such contract with the company; if it was necessary or convenient he should keep the stock, he should never assume to make a contract with the company through himself, and thereby charge the company with it, but he should submit it
454 to some other officer or agent who had authority to transact the business in that behalf, and make the contract with him.

In determining this cause of action you will determine.

First. Whether he has had any such charge of stock and has kept it.

Second. If so, determine whether — has made any contract with any other agent than himself in relation to it.

Third. If he has not, he can only recover the actual outlay he has incurred on the part of the company, and you should remember, also, the by-laws of this incorporation in this connection, that I have called your attention to. If you find they are the by-laws of the company, and the articles of association, and remember it is his duty under such circumstances to report to the company the amount of expenditure within a reasonable time, giving them the items of it so that the company may keep track of its business in a fair business way; and determine from all these circumstances whether there is anything due to the plaintiff upon this cause of action. If there is not, of course your duties with this cause of action will end. If you find in favor of the plaintiff, then you will confront the question of interest, and in this, like the other cause of action, *on* the company are only liable for what is found to be due for interest upon it from the time he has reported to them what the expenditure was and asked for payment, and if he never did that be-
455 fore the commencement of this action, he can only recover interest from the date of the filing of this complaint. The date of filing this suit was June 9, 1888. These files may be taken with you to show the exact date.

In the third cause of action the plaintiff claims that he, at the request of the defendant, rendered services as general manager of its business from January 1, 1883, to December 1, 1887; that the services were reasonably worth $250 per month; and that defendant is indebted to plaintiff $14,750 therefor. The theory of the plaintiff is, that after the organization of this company he was entrusted as manager, as matter of practice, at least, with the general management of its business; that at least a portion of the affairs of the company were committed to his care and that he managed that for the company, and that he is entitled to recover pay for those services. The testimony tends to show that the plaintiff in this case, as I said before, was one of the principal incorporators of the company; that he was interested in the enterprise which this corporation assumed, owning a large portion of its stock; and that Mr. Kerr and he owned nearly the entire stock; that he was vice-president of the company and was a director upon its board of directors. It is claimed on the part of the defendant that whatever services were rendered by the plaintiff to the corporation *was* rendered as such director and vice-president. If an officer of an incorporated company renders services which are rendered in the capacity
456 of such officer, then he cannot recover for any such services except he has some special and express contract with the company or with the corporation. If a director, or president, or secretary of an incorporated company expects a salary or expects compensation for his services by the month or by the year, as such officer, he must show an express authority or an express contract for the wages he claims for, either by a vote of the board of directors or by some express contract entered into between him and the company. In this case, if you should find that the plaintiff rendered these services as director or as vice-president, that would end the consideration of this cause of action, because he cannot recover for that; but if an officer of a corporation renders services which are clearly without his duties as such officer, under such circumstances there is an implied promise to pay for them, and one may recover for such services under such circumstances upon an implied promise to pay for such services; for instance, a director of a company whose business it is by the by-laws simply to meet with the board of directors and give to them his business judgement in that meeting and to vote upon this or that, and be present perhaps once a month or once in three months or once a year, will not be compelled to render services as an attorney, and if such director was an attorney and appeared in the courts and rendered services for the company under such circumstances as would imply a promise to pay for it, he might recover on the implied promise to pay for such services; so any
457 further question under this cause of action can only arise when you have found he has performed these services in some character outside of director and vice-president. If such services have been rendered then you will meet with the proposition. Even though the labor may have been performed outside of the officer's duty, yet they must be *be* under such circumstances as will

imply a promise to pay for them. If a person is interested in an enterprise and takes hold and gratuitously, and for the purpose of promoting the enterprise, together with the other incorporators, renders services to the company, and it is not intended to charge for them, and it is his understanding all along not to charge for them, and that he is to receive no compensation except such as he receives through his interest in the concern, then he cannot charge for his services, and he has no claim against the company for those services. They are gratuitous so far as the corporation is concerned; so, in this case, if the circumstances repeal the idea that these services are to be compensated for by the company, then Mr. Toponce, no matter what his services may have been to the company, he cannot recover for it. And in determining that matter, you should take into account the course of business of the concern; whether it was the practice and habit of the corporation to pay for services rendered upon its ranches in Corinne by its members, in running its mills, or whether it was the custom of that corporation to run its affairs by the corporators, who should not receive
458 payment for their service, and you should take into account whether he has ever presented any claim to the company for these services as bearing upon the question as to whether he ever intended to charge for them. If it was the understanding on the part of the persons engaged with him in this enterprise that the services he was rendering were simply as an incorporator and without any expectation that he was going to charge a salary for it, even though the plaintiff in this case may have had some secret idea that at the end of the enterprise he would then present a bill and call for payment for the services he had rendered; if he knew that and understood that the incorporators were depending upon that, and supposing he was not charging for it, under such circumstances he cannot recover for the services rendered the company. In determining whether it was the intention that he should render these services as an incorporator, and gratuitously, you can take into consideration all the circumstances of the case, and even though it may be plain that afterward, on account of some wrong or supposed wrong he had suffered from the company, in which he thought, or it might be the fact, that they had not treated him as they ought, or he may not have been admitted to full rights as he thought, or as you may think; if it was an after-thought that he should charge for these services, he cannot recover for them; or if it was the fair understanding between these corporators that each should take hold like a copartnership and render such services as they could, devoting time and
459 attention to it, one to one portion and the other to the other, and no charge made, if that was the purpose or understanding between these parties, and the services were rendered in pursuance of that, he cannot charge for any compensation in this case for any services rendered to the company; in other words, you must find, before the plaintiff can recover upon this cause of action, in the first place, that the services that were rendered were clearly outside of his duties as vice-president and director, and that they were rendered under such circumstances as raises an im-

plied promise to pay for the services on the part of the company, and unless that is shown he cannot recover for any services rendered to the company under this cause of action, and if you find that there is nothing due on this cause of action, then your duties in relation to this will cease. If you determine that the defendant is indebted to the plaintiff upon this cause of action, you will determine the principal, and then as to the question of interest, you will determine when he first made known to the corporation what he claimed was his due, and if when this action was brought was the first time that he did that, that would be the date from which to reckon the interest, and that should be added to the principal sum on this cause of action; and the aggregate would be the entire sum due on this cause of action.

The fourth cause of action of the plaintiff's complaint is that there is $143.68 due to Lee Owsley on an account for work
460 and labor performed that he has assigned to plaintiff, and that he is entitled to recover from the plaintiff that amount. I believe that the answer admits this cause of action, does it not, Mr. Bennett?

Mr. BENNETT: I think it does.

The COURT: This is admitted, so you will determine when that became due, if there was an express contract to pay it, he would be entitled to interest from that time to be added to it. In this cause of action you will simply have to determine when it became due, and the interest from that time added to $143.68 will constitute the amount due upon that cause of action.

Mr. KIMBALL: I will state that we don't claim any interest in the complaint except from the filing of it.

The COURT: The fifth cause of action is for an account for board due to Lee Owsley, and assigned by Owsley to the plaintiff. Under this cause of action, gentlemen, it is simply an account for board, and if you should find, as matter of fact, that Mr. Owsley, pursuant to some contract that he had with the company, furnished to this company board for its men, then you should determine the amount that would be principal and for that you should give a verdict in this case, and added to that should be the interest from the time the account was due.

It is a mere matter of common sense to determine how much from the testimony was due to the plaintiff, if anything, from this board account.

461 Now, gentlemen, in view of the somewhat complicated character of this case I shall submit to you, along with the general verdict, certain questions to be answered in relation to the various causes of action. The general verdict which you shall render—before I speak of that, however, I want to call your attention to the counter-claim. The defendant in his answer claims that there is an amount due to him upon an open account of some twenty-odd hundred dollars—about two thousand dollars, and he sets that up here as a counter-claim. It is the amount due upon an open current account of the plaintiff upon the books of the company and you will remember that the account is not disputed to

the eighth of November, 1887, some twenty-odd hundred dollars, and there are a few items after that are in dispute, I believe it is only one or two. In this account you will find an item of 30th November, 1887, $15.00. That item the court has taken from the consideration of the jury, upon the ground that there is nothing to show that the plaintiff is liable for it, so that will be deducted from the total amount of this account, and there is another item of $123.75 which is withdrawn because it is not proper *that a* charge against the plaintiff, leaving only the item of $888.74 which is in dispute. The $105 item is withdrawn from the jury, so there is but one item in that account for you to determine the propriety of as against the plaintiff, and that is the $888.74, and as to that item

462 the testimony tends to show that it was money that was received for the sale of stock and deposited in the Deseret National bank, and that Mr. Topenee, the *the* plaintiff in this case drew it out upon checks. The money having been traced to him it will be a proper charge against him, but if you should find that the checks he drew against that account were drawn for corporate purposes and to pay the expenses of the corporation, then, of course, that would be accounting for the money, and that item ought not to be allowed against him. That is the only disputed item, so the counter-claim is quite substantially agreed upon except that item, and when you have determined the amount of the counter-claim, then you will allow interest upon it the same as you do upon the other items, allow to the defendant interest upon that at ten per cent., and the principal and interest on that would constitute the aggregate of the counter-claim. You would readily see that when you have determined what, if anything, is due to the plaintiff upon these various causes of action and they are all added together, it, together with the -nterest, would be the amount due the plaintiff, and the amount of the counter-claim, with the interest thereon, should be deducted from the aggregate amount due upon these five causes of action, and that would constitute your verdict, which you would render in favor of the plaintiff, if there is anything his due. If the amount of the counter-claim overbalances the amount due the plaintiff, the difference would show the amount to be returned in favor of the defendant.

The forms of verdict in this case—the general verdict—is as follows:

463 "We, the jury, empanelled in the above-entitled action, find the issues therein joined in favor of the plaintiff and against the defendant, and assess his damages at—(stating the general balance, if it is found in favor of the plaintiff) and a like one on the part of the defendant."

In addition to that, I submit the following five, which I should like returned in writing, and I will now instruct you with reference to them:

"First. Do you find that the defendant is indebted to the plaintiff for money laid out and expended by the plaintiff for the defendant and at its request, as stated and alleged by the plaintiff in the first

cause of action? And, if you do, how much of principal and how much of interest thereon?"

Now, that will be answered if you answer no; then that would end all consideration of that cause of action; but if you should find a certain amount as principal, then you will answer yes, we find so much principal and interest so much, and that would constitute the amount due upon that first cause of action.

Second. I have submitted another in relation to the first cause of action:

"If you find anything due the plaintiff on the first cause of action, do you include in it any part of the charge made by the plaintiff for money paid for traveling expenses, being the item charged in his bill of items at $1,300. And, if so, how much?"

464 If you should answer, no, we find nothing, it wouldn't be necessary to answer the second; but if you find there is anything due, what I want to know is whether you include anything in it upon the item of $1,300? It is unnecessary to reckon any interest in relation to that one. It is simply whether you allow any part of $1,300 or not.

Third. The next is the following:

"Is the defendant indebted to the plaintiff upon an account for feeding, caring for and keeping the horses and stock of the defendant at its request, as stated in the second cause of action in plaintiff's complaint? If so, how much of principal and interest?"

You will readily see that that applies to the second cause of action, and if you should determine that anything is due to the plaintiff upon this cause of action you will answer yes, following it with the amount of principal and the amount of interest.

Fourth. Is the defendant indebted to the plaintiff for services rendered by plaintiff as general manager at the request of the defendant as set forth in the third cause of action? And if so, how much? State principal and interest separately. I simply want to find how much is assigned on each one of these causes of action.

"Fifth. How much is the defendant indebted to the plaintiff for services rendered by Lee Owsley to the defendant and assigned by him to the plaintiff, set forth in the fo-rth cause of action, stating principal and interest separately?"

465 Those are the special findings, and you will see that having found the special findings, that adding them all together except the second, which is a special finding as to the first cause of action, these would constitute the aggregate amount you would find in favor of the plaintiff, and then when you have found the amount due to the defendant the difference would be struck and that would go into your general verdict. You see this states the account between these parties here on every cause of action separately so that it may be left here on record in a shape that may be reviewed if it should ever become necessary to do so.

"How much is due to the defendant on an open account as stated in defendant's answer as a counter-claim against the plaintiff, stating principal and interest?" When you find that *teat* will state the account fully between these parties. You may have the com-

plaint and answer with you in your jury-room from which to reckon this, and I now call your attention to the fact that there are two claims stated there as counter-claims which I have withdrawn from the consideration of the jury. The only counter-claim with which you have anything to do is the claim upon the open account as stated upon the books of the company which I have called your attention to.

Now, gentlemen, you are the sole judges of the facts in this case, and of the credibility of all the witnesses and the weight of the testimony. You are to take the case and consider it carefully and patiently, as to each cause of action separately, determining
466 each carefully and applying your business judgment and good common sense to it, weighing the testimony as men of reason and common sense, and determine these various questions; and when you have done so, state to the court the result at which you have arrived, by your verdict.

Mr. KIMBALL: It is agreed by the parties to this action that, in case of an appeal, on motion for a new trial, either party can take such exceptions to the instructions given and refused as he may deem proper.

Supplemental Instructions.

The COURT: What was it you wished to know?

A JUROR: We can't decide where the second cause of action begins on this paper.

The COURT: This is the first cause of action.

The JUROR: What are these marks?

The COURT: Those are some marks that there was some dispute about.

The JUROR: Mr. Rogers, for instance, what does this intorrogation here mean?

Mr. ROGERS: I am not allowed to say — thing.

The COURT: Those are private marks. Those are simply private marks that are not evidence. They are simply where some one has checked them off for private convenience.

Another JUROR: This item of nine hundred and some odd, was that, part of it, paid by the company?

The COURT: That is a question of fact for you to *to* determine. That is all the account that is presented here.

467 Another JUROR: There were three charges that were to be deducted, two charges of $15 each?

The COURT: That is out of your control.

Mr. ROGERS: We consent that the $994 item should be stricken out by the jury.

A JUROR: Then, where are the fourth and fifth causes of action mentioned in the complaint?

The COURT: That statement contains all the book account and the first and second causes of action, and it is all the account there is in relation to it.

The JUROR: We got the idea there was a bill more in detail than this one.

The COURT: They used some from the bar, but they are copies of this. This is all there is of it, and you will remember what the testimony was in relation to it. As to the third cause of action—the salary—there is no bill of items of that; and, as to the two last, the Owsley matters, they were not seriously in dispute, anyway.

Supplemental Instructions.

Mr. SHILLING: We would like instructions on the second cause of action about feeding the stock.

The COURT: The instruction I gave or attempted to give was, in a general way, that a party acting as agent for a corporation, whether he is an officer or an ordinary agent, is compelled to incur for his principal, that his principal is liable for that in the first instance for any necessary expense, but it is improper for any agent or
468 officer of a corporation, if he is doing any part of the business of the corporation, to make a contract with himself, if he has charge of a band of sheep, or horses or cattle, and it is his duty to look after them and take care of them, and there is not sufficient commodities furnished for that purpose, and he has to make a contract with somebody else, yet he ought not to contract with himself to take charge of them and settle as between himself and the company what he shall have, because that is illegal and a fraud. No agent has a right to do that, but the company would be liable, under such circumstances, for what he actually has to expend. If it was necessary for the plaintiff in this case to have hay or grain for the subsistence of the stock that was in his charge and it was not furnished by the defendant and he furnished it, then the company would only be liable for what he actually paid out for that. He cannot make a contract with the company that he will take their stock and put it in his barn and charge for that at livery-stable prices and make that kind of a contract standing on both sides, contracting that the stock shall be kept and that he shall keep it, because he represents both sides of the transaction, but he is entitled to have just whatever he has paid out; if he has paid out anything for corn or for hay or grain which he has furnished to the company's stock the company will be liable for that and only that. And you should determine in the first place whether there is any such thing, and, in the next place, whether, if there is any such thing, it
469 has been paid for, and, if it has not been paid for, how much there is of it, and, in that way, arrive at what, if anything, is due under the second cause of action.

Mr. KIMBALL: I would like you to charge them that if the feeding, stabling and caring for that stock should be found to have been by an arrangement with any officer of the company, he would have the right to charge for that.

Mr. BENNETT: We object; there is no evidence of that fact.

Mr. KIMBALL: We submit there was by two witnesses, Mr. Owsley and Alex. Toponce; they both testified the stock was taken up at

the instance of Mr. Kerr and put in by his instance, and the man in charge of them was discharged, and they made an arrangement that Mr. Toponce was to have the care of them.

The COURT: Gentlemen, you are the sole judges as to what the facts establish. I don't think there is any harm in stating to you, as an abstract principal of law, that if they were taken care of by an arrangement with some other agent of the company this rule I have mentioned does not apply. If the contract with the plaintiff in this case to expend or to render the services in taking care of that stock was made with some other agent of the company it would stand wholly upon a different basis; it would then be *then* as to whether the services were rendered in the proper manner and what the contract price was, if there was a contract price, and,
470 if not, what it was worth; but, of course, to have that apply, you must find upon all these causes of action this one as well as every other—it is the duty of the plaintiff to establish, by a preponderance of evidence what the services or expenditures were, he must show them definitely and specifically.

Mr. SHILLING: Itemize the different accounts.

The COURT: I won't say he must do that, but as I charged you in relation to the first cause of action, and in relation especially to traveling expenses, consider what it was the duty of an incorporator to do under the articles of incorporation, if you find them to be the articles of incorporation, consider the duty of an incorporator under them, who renders services for the company and incurs expenses, to report to the company those expenses within a reasonable time, and you ought to find some reasonable excuse for his not having done so, if it is not done, before a party can recover. It is the right of this corporation, as it is the right of an individual, to conduct their business upon business principles, and to know and to keep track of their business affairs just as it is individual's, and they cannot be compelled to let their business run from year to year at loose ends, and if they have contracted between themselves that they will report to their treasurer and to their officers on the expenses that have been incurred from time to time, that is their legal duty, that is imposed upon them if they have agreed by their articles of incorporation, and signing the articles of incorporation has all the
471 force of a contract, and if a party is claiming any benefit from it he must show some excuse if he has not complied with it. Now, that, I think, answers your questions, and while you are in court I wish again to call your attention to the fact this is a case that requires considerable time and attention, and while you are detained with it I shall see that your wants are all paid proper attention to. Every one connected with this case can readily see that it is one that should take a great deal of care and time, and you should take all the time that you want.

Mr. BENNETT: We will cheerfully obey all the orders of the court in the matter.

The COURT: Of course, all the parties will.

OGDEN, *April* 4, 1889.

I, P. E. Keeler, official reporter *pro tem.* of first district court of Utah, hereby certify that the foregoing is a full and correct transcript of all the instructions given to the jury by the court in the above-mentioned case.

P. E. KEELER,
Official Reporter pro Tem.

The defendant duly excepted, and excepts, to the whole and every separate part of the charge, for the reason that same is not a concise and exact statement of law applicable to the evidence; and, for the further reason, that same does not contain and that same is not a proper giving or modification of defendant's requests.

472 The court submitted to the jury special findings, and on March 19, 1889, the jury returned the following general verdict and special findings into court.

Title of Court and Cause.

Verdict.

We, the jury empanelled in the above-entitled action, find the issues joined therein in favor of the plaintiff and against the defendant, and assess the damages of the plaintiff at the sum of $11,839.56.

W. N. SHILLING, *Foreman.*

TERRITORY OF UTAH, } ss:
County of Weber, }

I, H. H. Henderson, clerk of the district court of the first judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true and correct copy of the original verdict in the herein-above-entitled action, as the same now appears on file and of record in my office at Ogden City, Weber county, Utah Territory.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 26th day of March, A. D. 1889.

[L. S.] H. H. HENDERSON, *Clerk.*

Title of Court and Cause.

Special Verdict.

First.

473 Do you find that the defendant is indebted to the plaintiff for money paid, laid out and expended by the plaintiff for the defendant and at its request, as stated and alleged by the plaintiff in the first cause of action? And, if you do, how much of principal, and how much of interest thereon?

Principal	$3,195 13
Interest	248 45
	$3,443 58

W. N. SHILLING, *Foreman.*

Second.

If you find anything due to the plaintiff on the first cause of action, do you include it in any part of the charge made by the plaintiff for money paid for traveling expenses, being the item charged in his bill of items at $1,300? And, if so, how much?

Yes; $70.

W. N. SHILLING, *Foreman.*

Three.

Is the defendant indebted to the plaintiff upon an account for feeding, caring for and keeping the horses and stock of the defendant, at its request, as stated in the second cause of action in plaintiff's complaint? If so, how much of principal and interest?

Principal	$218 25
Interest	16 89
	$235 14

W. N. SHILLING, *Foreman.*

Four.

Is the defendant indebted to the plaintiff for services ren-
474 dered by plaintiff, as general manager, at the request of the defendant, as set forth in the third cause of action; and, if so, how much? State principal and interest separately.

Principal	$8,850 00
Interest	688 40
	$9,538 40

W. N. SHILLING, *Foreman.*

Fifth.

How much is defendant indebted to the plaintiff for services rendered by Lea Owsley to the defendant and assigned by him to the plaintiff, as set forth in the fourth cause of action, stating principal and interest separately?

Principal	$143 68
Interest	11 10
	$154 78

W. N. SHILLING, *Foreman.*

Sixth.

How much, if anything, is the defendant indebted to the plaintiff for board furnished by Lee Owsley and assigned by him to plaintiff as stated in the fifth cause of action, stating principal and interest separately?

Principal	$581 32
Interest	45 16
	$626 48

W. N. SHILLING, *Foreman.*

Seventh.

How much, if anything, is the plaintiff indebted to
475 the defendant upon open account, as stated in defendant's answer as a counter-claim against the plaintiff, stating principal and interest?

Principal	$2,467 02
Interest	191 80
	$2,658 82

W. N. SHILLING, *Foreman.*

Filed March 19, 1889.

H. H. HENDERSON, *Clerk,*
By A. H. DRAKE, *Deputy Clerk.*

On March 27, 1889, the defendant served on plaintiff's attorney and filed a notice of intention to move for a new trial, as follows:

Title of Cause and Action.

To the plaintiff and his attorneys, Kimball & White:

You are notified that the defendant intends to and will move the court to vacate and set aside the verdict and judgment given and rendered herein in favor of plaintiff and against defendant, and to grant a new trial of the action, on the following grounds, to wit:

1. Irregularity in the proceedings of the jury by which defendant was prevented from having a fair trial, in this, to wit: The acceptance of Juror W. N. Shilling, who, on his *voir dire*, swore that he did not sustain the relation of debtor to defendant, whereas in truth and in fact he did sustain such relation, and the fact was not discovered by defendant until too late to raise the objection.

476 2. Insufficiency of the evidence to justify the verdict and the judgment.

3. That the verdict and judgment are against law.

4. Error in law occurring at the trial and excepted to by the defendant.

The motion will be made on affidavit, and on a statement of the case to be hereafter prepared and filed and served on you.

Dated March 26, 1889.

BENNETT & BRADLEY,
Att'ys for Defendant.

After the verdict the time to make and serve a statement for motion for a new trial and appeal was by order of the court extended to May 20, 1889, and on May 17, 1889, was, by further order of the court, extended to June 19, 1889.

The defendant specifies the following particulars, in which the evidence is insufficient to justify the verdict and special findings:

1. As to the first cause of action, the evidence is insufficient to show and does not show that plaintiff ever paid, but does establish that plaintiff never paid, laid out or expended for the defendant, at its request, between the dates alleged, or at any time, any of the sums alleged and referred to in the complaint aggregating $4,882.23, or amounting to the aggregate sum found by the jury, to wit, $3,195.13 principal, or any sum or amounts, except the sums allowed and credited plaintiff on his account with defendant, counter-
477 claimed herein, for any of the matters, claimed or otherwise. The evidence is insufficient to show and does not show that any or either of said sums, or any sum, is due or remains unpaid from defendant to plaintiff, or that defendant is indebted to plaintiff in either of said aggregate sums or in any sums or amount. If any cause of action ever existed for the sums and amounts which plaintiff alleges and attempts to show he paid, laid out and expended prior to June 9, 1886, the same was and is barred by the statute of limitations. The evidence shows that during all the time referred to in the complaint and testimony, the plaintiff was one of the principal officers and a director of the defendant. As to the expense items testified to, as having arisen in certain suits, the testimony shows that the plaintiff undertook these suits on his own responsibility and at his own expense, and that defendant was not to pay any of the expenses incurred therein; and that if plaintiff paid any such expenses he paid them voluntarily and for himself and without the authority or request of the company. The evidence also shows the plaintiff never claimed or demanded payment or ever kept or rendered an account to defendant of or for but few, if any, of the items included herein and found by the jury, and that those claimed and accounted for did not equal the sum found by the jury over $1,000; that the course of business between plaintiff and defendant was, whenever plaintiff made claim for expense, it was either allowed or disallowed, and if al-
478 lowed was credited plaintiff on his account with defendant counterclaimed herein, and if disallowed it was considered and conceded by both parties hereto to be invalid as against defendant, and no subsequent claim made therefor, and nearly all the items going to make up the first cause of action were either allowed and are credited plaintiff on said account, or else allowed under this practice, and came within this understanding. The evidence is insufficient to show the plaintiff paid $70, for travelling expenses, at defendant's request, express or implied; but the evidence shows he paid much less and little or nothing for such expenses, and none of them at defendant's request.

The evidence shows also the by-laws; that they were adopted by consent of plaintiff as a stockholder and director, and that he had

notice and knowledge of same; that the by-laws provided and contemplated that the treasurer only, of the defendant should be the proper custodian of the defendant's funds and the sole disbursing officer and agent, and defined and limited the methods of payment and disbursement, so that the financial showing provided for in the by-laws might and would be always at hand. The evidence also shows that the course of the business of defendant, which was known to plaintiff, was against plaintiff's right and privilege to make money payments on account of the defendant, and that any such payments or advances would be outside of and beyond the course of business to plaintiff's knowledge.

479 2. As to the second cause of action alleged, the evidence is insufficient to show and does not show that plaintiff ever fed, but does show that plaintiff never fed, cared for or kept any horses or stock of defendant at its request or otherwise, or at its request or otherwise furnished any such animals with feed, hay or grain to the amount or of the value alleged, to wit, $1,133.25, or found by the jury, to wit, $218.25, or to any amount or to any value so great as that found by the jury, or that defendant is indebted to plaintiff therefor in the sum found or in any sum. If any cause for action ever existed for feed, care and keeping which plaintiff alleges and attempts to prove was furnished by him prior to June 9, 1886, the same was and is barred by the statute. The evidence shows that, if the plaintiff obtained or furnished any of the feed or keep at all, he obtained it from himself and furnished it himself, and in doing so attempted to deal for the defendant with himself, and the care and service, which he attempts to charge defendant with and for which partly the jury has found for plaintiff, was devoted in part by himself, and during the time he was one of the officers and a director and while he claimed to be manager of defendant and its business, and that this kind of care and service was within the line of his duty, and he alleges and claims and the jury allows him compensation for such service on an independent cause of action alleged.

480 The evidence also shows that plaintiff on this claimed feed account—has charged a profit on the account, which the jury has allowed him; that he assumed the position of feed stable keeper of the company's stock and dealt with himself, charging the company not the actual expense but regular livery stable figures at so much per day.

3. As to the third cause of action, the evidence is insufficient to show and does not show that the plaintiff, at the defendant's request, ever rendered services, but shows that he did not at defendant's request render services to or for defendant as manager or otherwise entitling him to pay or services of the worth or value alleged or found by the jury or of any worth or value. The evidence is insufficient to show and does not show that the sum alleged or found by the jury or any sum is due from defendant to plaintiff or remains unpaid or that defendant is indebted to plaintiff therefor in any sum or amount, and the evidence shows that no sum is due or unpaid and that defendant is not indebted to plaintiff. The evi-

dence shows that plaintiff did act for defendant and perform some services, and that he claimed the services were performed by him as general manager of defendant, but there is no evidence showing he was general manager of defendant or its business, but that the management was divided up among several persons, heads and subordinates. It is shown that during the times referred to plaintiff was one of the principal officers and a director of defendant; that at or about the time defendant was incorporated it was agreed and understood between plaintiff and one Kerr who ever since the incorporation has
481 been president of defendant, that the plaintiff should contribute to defendant all his time and services gratuitously, and that this was the continuous and common understanding of the principal officers, directors and stockholders of defendant, and this understanding was always acted and relied upon by defendant and its officers and directors including Kerr and the plaintiff himself; that there was no express or implied understanding or agreement between plaintiff and defendant or its officers that he should be paid, and facts are not shown from which the law will imply or promise to pay for services. The evidence shows that the services were furnished voluntarily and gratuitously, and without expectation of pay; that plaintiff never prior to this suit claimed or pretended in any way that he was entitled to or was to receive pay for time or service; that all such services were clearly within the range of his legal duty toward defendant, and not beyond the line of his official duties. The evidence is insufficient to show and does not show that the services were of any value whatever, and the evidence shows that they were negligently and unfaithfully performed, that plaintiff didn't devote his time and attention to same, that part of the service was in looking after suits he undertook on his own responsibility, that much of the service was unnecessary, that he disposed of property without the sanction of defendant, sold defendant's property to himself, made contracts for defendant with himself, didn't keep defendant posted as to its rights, failed to make
482 returns on pasturage account of his own cattle, allowed the possessory rights of defendant in lands to lapse, did not keep himself posted as to the condition or the business of the defendant, or what its assets were, or what it was doing by way of increase in stock and property, and various other acts and omissions of mismanagement, and that defendant lost largely as the result of his claimed services, and that the services were an actual damage and injury and of no benefit or value to defendant and of no value whatever, and that plaintiff was grossly derelict in his duty toward defendant concerning his service. The plaintiff's own testimony shows that, on his versson of the agreement or understanding between himself and Kerr concerning the service and interest on the sheep, he, the plaintiff, is not entitled to recover for any of the services. That if any cause of action ever existed for services performed prior to June 9, 1886, the same is barred by the statute.

4. As to the fifth cause of action the evidence is insufficient to show, and does not show, that defendant was or is indebted to

Owsley in the sum alleged or found by the jury, or in any sum, a balance or otherwise, upon the account alleged, or for board furnished or for any matter or thing, or that Owsley ever furnished any board to the defendant's employés at its request or otherwise, or that the board claimed was of any value or amount whatever, or that the sum found by the jury, or any sum, is due or unpaid from defendant to plaintiff, and no account or balance of account is shown.

483 5. The evidence does not show and is insufficient to show that defendant is indebted to plaintiff in the sum total of $11,339.56, found by the jury, or in any sum or amount, for any or all of the matters claimed or for anything whatever.

On the contrary, the evidence shows and establishes each and all the facts alleged in the second, third and fourth counter-claims set up in the answer, and that the amount of said several counter-claims is an existing and unpaid indebtedness to defendant, and an offset to plaintiff's demands herein. The evidence shows that plaintiff is indebted to defendant on the fourth counter-claim in a much larger amount than the $2,658.82, including interest, allowed by the jury, and that all the items of the amount after Nov., 1887, are just charges against plaintiff, due and unpaid, and should have been allowed by the jury. The evidence shows that defendant is entitled on its counter-claims to judgment against plaintiff for an amount over and above the amount allowed plaintiff by the jury. Fuller specifications cannot be given without a review and statement of the details of the entire evidence, which is very voluminous.

The defendant will rely on the errors in law occurring at the trial, in the various matters to which objections and exceptions were taken by defendant, and to admission and rejection of evidence, and to the ruling adverse to defendant on motions to strike out, and on the exceptions to the whole and to portions of the charge;

484 and to the refusal to give, either as requested or with modification, the defendant's requests; and to the refusal and failure to give the instructions numbered five, six, seven, seven and one-half, seven and three-quarters, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen and seventeen, and each of them, as requested or with modification in such manner that it might have distinctly appeared what of each of said instructions were given in whole or in part or refused absolutely, and on the allowance of the amendment on trial of plaintiff's complaint, as error; all of which appears specifically in the foregoing statement. As the charge was given, it is impracticable for defendant, to more fully specify error in the charge, which defendant could not do without an extended written argument on the charge, eliminating in each instance the erroneous portions from their juxtaposition with the correct portions and reviewing the whole charge in each instance to show that the error was nowhere corrected.

Defendant also assigns as error each and every special finding and the general verdict of the jury, as not in accordance with the evidence in the case, and as not the legal deduction from or result of the evidence, and as not warranted by or founded on the evidence

in the case, except as to the seventh special finding and to the general verdict, so far as the same includes or takes into consideration the amount found due defendant from plaintiff in said seventh special finding, and as to that finding and as to so much of
485 the general verdict as includes or takes into consideration the amount of said seventh finding, defendant assigns as error that the evidence shows plaintiff is indebted to defendant on the fourth counter-claim in a much larger sum than is found by the jury in said seventh special finding, and that each and all the items and sums shown in defendant's account against plaintiff as charges after November, 1887, are justly due, owing and unpaid from and by plaintiff to defendant, and should have been allowed defendant by the jury.

BENNETT & BRADLEY,
Att'ys for Defendant.

Due service of the foregoing statement *on made* us June 17, 1889.

KIMBALL & WHITE,
Att'ys for Plaintiff.

The foregoing statement is settled and I certify the same is allowed.

HENRY P. HENDERSON, *Judge.*

Filed July 29, 1889.

H. H. HENDERSON, *Clerk.*

Title of Court and Cause.

Assignment of Error on Appeal.

In addition to the errors assigned in the statement on motion for a new trial and appeal the defendant assigns as error the following:

1. The court erred in overruling defendant's motion for a new trial.
2. The court erred in rendering judgment against defendant.

BENNETT & BRADLEY,
Att'ys for Defendant.

Fowler's Affidavit.

OGDEN, UTAH, *July* 25, 1887.

Mr. A. Toponce, Corinne.

486 DEAR SIR: Replying to yours of 22nd, asking me to come up Monday or Tuesday for my horses.

Albert Warren will leave North Ogden to-morrow, Tuesday morning, and will stop at Corinne on his way, and I trust you may leave all the horses for him, so I will not have to send again. I saw Alex. here to-day, and he says they are O K.

Yours truly, W. N. SHILLING.

(Exhibit A.)

OGDEN, UTAH, *July* 24, 1888.

Corinne M., C. & S. Co., Corinne, Utah.

GENTLEMEN: Replying to your statement of 30th June, can only repeat in substance what I wrote you regarding May statement: When I can get my horses am ready to pay ranch bill.

I have sent for them repeatedly, but without success, and I am getting tired of it, and want my horses.

Respectfully, W. N. SHILLING.

(Exhibit B.)

OGDEN, UTAH, *January* 24, 1888.

Corinne Mill, Canal & Stock Co., Corinne, Utah.

GENTLEMEN: Replying to your statement just received: Can only make the same reply as heretofore: That I am ready and anxious to meet your demands when I have a proper showing to me of the horses I left in your hands.

Very respectfully. W. N. SHILLING.

(Exhibit C.)

Title of Court and Cause.

TERRITORY OF UTAH, } ss:
Box Elder County, }

487 J. K. Fowler, being first duly sworn, on oath say-: On all the dates and at and during all the times hereinafter named and referred to I was, and I am, the secretary of the defendant herein, and had and have the custody of the correspondence of defendant. I attach hereto, make part hereof, and mark Exhibits A, B and C, the originals of three several letters received by the defendant from W. N. Shilling, who served as a juror on the trial of this case. These letters were written by said Shilling concerning the account and the subject-matter thereof, mentioned in my affidavit made herein on March 27, 1889, the one marked Exhibit A, addressed to A. Toponce, being intended for the company.

J. K. FOWLER,
Secretary C. M., C. & S. Co.

Subscribed and sworn to before me April 3, 1889.

R. S. GUTHRIE,
Notary Public, Box Elder Co., Utah.

Due service of a copy admitted, after filing, April 5, 1889.

KIMBALL & WHITE,
Plaintiff's Attorney-.

Filed April 5th, A. D., 1889.

H. H. HENDERSON, *Clerk,*
By A. H. DRAKE, *Deputy Clerk.*

Title of Court and Cause.

Marsh's Affidavit.

UTAH TERRITORY, } ss:
Weber County, }

488 George Marsh, being first duly sworn, on oath says: I am one of the attorneys who took part in the trial of this case for defendant. Mr. C. W. Bennett was the only other attorney engaged in the trial on behalf of defendant. I never at any time prior to the second day of the trial hereof, knew of the existence of any account, disputed or otherwise, held by the defendant company against Juror W. N. Shilling, or that the defendant and said Shilling ever at any time sustained any business relations toward or with each other.

GEORGE J. MARSH.

Subscribed and sworn to before me April 3, 1889.

[L. S.] HEBER WRIGHT,
Notary Public.

Due service of a copy admitted April 5, 1889, after filing.

KIMBALL & WHITE,
Plaintiff's Attorneys.

Filed April 5, A. D. 1889.

H. H. HENDERSON, *Clerk,*
By A. H. DRAKE, *Deputy Clerk.*

Title of Court and Cause.

Bennett's Affidavit.

UTAH TERRITORY, } ss:
Salt Lake County, }

C. W. Bennett, being first duly sworn on oath, says: I am one of the attorneys who took part in the trial of this case for defendant. Mr. George Marsh was the only other attorney engaged in the trial, on behalf of defendant. I have read the affidavits of J. K. Fowler made herein on March 27th and April 3, 1889. I knew
489 nothing of the disputed account and business relations between the defendant and Juror W. N. Shilling, mentioned in said affidavits, until after the trial had proceeded at least one court day; neither did I, until after the trial had proceeded one day as aforesaid, know that Juror W. N. Shilling sustained or had ever at any time sustained business relations towards or with defendant herein. I attach hereto, make part hereof, and mark Exhibit "A," a copy of the questions asked of and the answers thereto made by said Juror Shilling on his *voir dire* examination as to his qualifications as a juror herein.

C. W. BENNETT.

Subscribed and sworn to before me, April 5, 1889.

WM. M. BRADLEY,
Notary Public, Salt Lake County, Utah.

Title of Court and Cause.

Examination of Jurors.

W. N. SHILLING, being called as juror, and sworn on his *voir dire*, answered as follows:

Examined by Mr. KIMBALL:

Q. Mr. Shilling, you live here in town?
A. Yes, sir.
Q. What business are you engaged in?
A. Banking.
Q. Are you a citizen of the United States?
A. Yes, sir.
Q. A resident of this judicial district?
A. Yes, sir.
490 Q. How long have you been a resident of this judicial district?
A. Four years.
Q. You are a tax-payer within this district?
A. Yes, sir.
Q. Have you ever been convicted of a felony?
A. No, sir.
Q. Are you subject to the military control of the United States Government?
A. No, sir.
Q. Are you acquainted with Mr. Toponce?
A. Yes, sir.
Q. With the Corinne Mill, Canal & Stock Co.?
A. Yes, sir.
Q. Have you any business relations with the defendant or the plaintsff at the present time?
A. No, sir.
Q. Did you hear me state what this controversy was about?
A. I heard a portion of it.
Q. Do you know anything of the facts in this case?
A. Not the details. I have heard portions. Some of the main points were expressed. That it was a suit to recover wages, something of that kind.
Q. You simply heard there was such a suit pending, and that it was for wages?
A. Yes, sir.
491 Q. From what you heard have you formed or expressed an opinion upon the merits of the case, as to which party ought to recover?
A. No, sir.
Q. Have you any bias or prejudice against either of the parties?
A. No, sir.

Q. If you were to remain on this jury could you render a verdict according to the law and evidence regardless of what you have heard of this case?

A. Yes, sir. I will say I have been asked to be a witness in this case and replied that I didn't know enough about it. I don't know upon what ground they wanted me to be a witness.

Q. You don't know personally of any of the facts in this case?

A. No, sir.

Q. And what you heard were not facts, but simply of the pendency of this suit, and it was for wages?

A. Yes, sir.

Pass for Couse.

Mr. MARSH to the juror:

Q. Mr. Shilling, a party asked you to be a witness; which party?

A. Mr. Toponce asked me to be a witness.

Q. Did he tell you upon what point he wanted you to testify?

A. No, sir; nor the subject; nothing about it.

Pass for Cause.

Mr. KIMBALL to the juror.

492 Q. That was before you were summoned on the jury?

A. Yes, sir; some time.

Q. Have you taken the Tucker-Edmunds oath?

A. Not on this occasion.

Q. You haven't taken it this term of court?

A. No, sir.

Mr. SHILLING: When you asked me before I hadn't heard the part about Mr. Owsley. I remember that he has told me on two different occasions that the company owed him for wages and he had hard work to get it. I wanted to make that statement so there would be no misunderstanding.

Mr. BENNETT: We have no challenge.

Jury Sworn.

OGDEN, *March 28th*, 1889.

I, P. E. Keeler, official reporter *pro tem.* of the first judicial district court of Utah, hereby certify the above is all the proceedings had upon the examination of W. N. Shilling, with reference to his qualifications to sit as a trial juror in the above-mentioned case.

P. E. KEELER,
Official Reporter pro Tem.

Due service of a copy of this affidavit admitted, after filing, April 5, 1889.

KIMBALL & WHITE,
Plaintiff's Attorneys.

Filed April 5, A. D. 1889.

H. H. HENDERSON, *Clerk*,
By A. H. DRAKE, *Deputy Clerk*.

493 Title of Court and Cause.

TERRITORY OF UTAH, } ss:
Box Elder County, }

Fowler's Affidavit.

J. K. Fowler, being first duly sworn, on oath says: I am secretary of defendant above named and have in my custody the account books of defendant, and the accounts appearing on those books are within my own knowledge. On the day that the jury was impaneled herein, and when Mr. W. N. Shilling, one of the jurors, was being examined as to his qualifications to serve on the jury herein, and during the trial of this cause, there stood on said account books and existed against said Shilling in favor of defendant herein an account amounting to $42.10 for the pasturage by said defendant of horses belonging to said Shilling at his request, on defendant's lands in Box Elder county, Utah. Said account and said amount thereof was at and during all the times aforesaid justly due and payable from said Shilling to defendant, no payment has been made thereon, and there were no offsets to the same to the knowledge of affiant, and Shilling had previously been requested by defendant but had refused and still refuses to pay the same or any part thereof and then disputed and still disputes the correctness and justness of the account and maintained and insisted and still maintains and insists that there was and that there is nothing due
494 to defendant from him thereon, while said company defendant maintained and claimed and still maintains and claims that the whole amount thereof was due, owing and unpaid from and by said Shilling to it.

Although said accounts were in my custody as aforesaid, I had not in mind but had entirely forgotten the said Shilling account and the same was entirely out of my memory at the time of his examination and acceptance as a juror as aforesaid, and the account did not occur to me until after the trial had progressed at least one day.

J. K. FOWLER,
Secretary C. M., C. & S. Co.

Subscribed and sworn to before me March 27, 1889.

R. S. GUTHRIE,
Notary Public, Box Elder Co., Utah Territory.

Due service of a copy admitted, after filing, April 5, 1889.

KIMBALL & WHITE,
Att'ys for Plaintiff.

Filed April 5th, A. D., 1889.

H. H. HENDERSON, *Clerk*,
By A. H. DRAKE, *Deputy Clerk*.

Title of Court and Cause.

UTAH TERRITORY, } ss:
Salt Lake County, }

Kerr's Affidavit.

John W. Kerr, being duly sworn, on oath says: I am president of the defendant herein. I was not present, but was in Salt
495 Lake City, when the jury was impanelled and sworn herein, and did not go to Ogden and was not present at the trial hereof until after all the witnesses for both plaintiff and defendant had been examined in chief. I knew about the disputed account between the defendant company and one Shilling, described in the accompanying affidavit of J. K. Fowler made herein, but not until Tuesday, March 19, 1889, did I know that a man named Shilling was a juror herein. The case was given to the jury on Tuesday morning, and I did not know until after the verdict was rendered herein that said Shilling, who owed said disputed account to the company, was the same W. N. Shilling who acted as juror herein. In fact, the said disputed account was not in my mind or memory at all until after the verdict had been given, and then for the first time I learned that the juror Shilling was the same Shilling who owed the defendant company said disputed account.

JOHN W. KERR.

Subscribed and sworn to before me March 23, 1889.

WM. BRADLEY,
Notary Public, Salt Lake County, Utah.

Due service of a copy admitted, after filing, April 5, 1889.

KIMBALL & WHITE,
Pl'ff's Att'ys.

Filed April 5, A. D. 1889.

H. H. HENDERSON, *Clerk,*
By A. H. DRAKE,
Deputy Clerk.

Title of Court and Cause.

Order Extending Time.

496 On motion of Messrs. Bennett & Bradley, it is ordered that defendant be and it is hereby granted thirty days' additional time in which to prepare and serve statement on motion for a new trial, and in the meanwhile all proceedings are stayed.

Done in open court May 17, '89.

H. P. HENDERSON, *Judge.*

Title of Court and Cause.

Stipulation.

Stipulated that the exhibits introduced in evidence and not appearing in full in the reporter's notes, may be considered as part of

the statement, and, if necessary, the originals of the exhibits used on motion for new trial and on the appeal of the case, without appearing in the statement or transcript on appeal.

May 17, 1889.

KIMBALL & WHITE,
Att'ys for Plaintiff.
BENNETT & BRADLEY,
Att'ys for Defendant.

Filed May 17, 1889.

H. H. HENDERSON, *Clerk.*

Title of Court and Cause.

Order Overruling Motion for a New Trial.

In this cause, the motion for a new trial having been heretofore argued and taken under advisement by the court, now comes the court, and being fully advised in the premises, orders that said motion be and the same is hereby overruled and denied.

Done in open court August 15, 1889.

H. P. HENDERSON, *Judge.*

497 Title of Court and Cause.

Notice of Appeal.

To the plaintiff and his attorneys, Messrs. Kimball & White:

You are notified that the defendant, The Corinne Mill, Canal & Stock Company, appeals from the whole and every part of the judgment for $11,339.56 and $307.45 costs, herein rendered against it and in favor of plaintiff on the 19th day of March, 1889, and from the whole and every part of the order overruling the defendant's motion for a new trial, made and entered on the 15th day of August, 1889.

Dated August 19, 1889.

BENNETT & BRADLEY,
Att'ys for Defendant.

Due service of a copy of this notice admitted, August 23, 1889, after filing.

J. N. KIMBALL,
Plaintiff's Attorney.

Filed August 23, 1889.

H. H. HENDERSON, *Clerk,*
By L. B. BEST, *Deputy Clerk.*

TERRITORY OF UTAH, } ss:
County of Weber, }

I, H. H. Henderson, clerk of the district court of the first judicial district, do hereby certify that the foregoing is a full, true and correct copy of the judgment-roll, notice of intention to move for a new trial, statement of case, order overruling motion for a new

trial, orders and stipulation extending time to prepare
498 and file statement on motion for a new trial, affidavits of C. W. Bennett, John W. Kerr and J. K. Fowler, and notice of appeal in the hereinabove-entitled action.

And I further certify that an undertaking on appeal in due form has been properly filed in my office.

Witness my hand and the seal of said court, this 12th day of November, 1889,

H. H. HENDERSON, *Clerk.*

A copy of this transcript served on me Nov. 12, 1889.

J. N. KIMBALL,
By WILL. G. YOUNG,
Attorney for Respondent.

499 In the Supreme Court, Utah Territory, January Term, 1890.

THURSDAY, *January* 16*th.*

ALEXANDER TOPONCE, Respondent,
vs.
THE CORINNE MILL, CANAL AND STOCK COMPANY, Appellant. } Appeal from 1st District.

This cause, coming on regularly to be heard, was argued by W. H. Dickson and C. W. Bennett, for appellant, and by J. G. Sutherland, for respondent, was submitted and taken under advisement.

June Term, 1890.

SATURDAY, *July* 12*th.*

ALEXANDER TOPONCE, Respondent,
vs.
THE CORINNE MILL, CANAL AND STOCK COMPANY, Appellant. } Appeal from 1st District.

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed.

500 In the Supreme Court, Utah Territory, June Term, 1890.

TUESDAY, *July* 15*th.*

ALEXANDER TOPONCE, Respondent,
vs.
THE CORINNE MILL, CANAL AND STOCK COMPANY, Appellant. } Appeal from 1st District.

In this cause, upon application therefor of appellant, by its counsel, it is ordered that the penal sum of a supersedeas bond to be given on writ of error, taking this cause to the Supreme Court of the United States be and is hereby fixed at twenty-two thousand seven hundred dollars ($22,700), and the bond for costs is fixed at three hundred dollars ($300).

501 In the Supreme Court of Utah Territory.

ALEXANDER TOPONCE, Plaintiff & Respondent,
vs.
CORINNE MILL, CANAL AND STOCK COMPANY, Defendant & Appellant.

Appeal from the 1st District—H. P. Henderson, J.

Appearances: Bennett & Bradley, for appellant; W. H. Dickson, of counsel; J. N. Kimball, Sutherland & Judd, for the respondent.

ANDERSON, *J.:*

The plaintiff sued the defendant on account on several distinct causes of action, one of which (the 3rd) was for services rendered to the defendant, at its request, as its general manager, from January 1st, 1883, to December 1st, 1887, which services are alleged to be reasonable worth two hundred and fifty dollars per month, and aggregating $14,750. The defendant by its answer denied specifically each count or cause of action set forth in the complaint, except the 4th. It also set up a counter-claim against the plaintiff, and pleaded the statute of limitations as to all that part of the plaintiff's demand which claimed for moneys paid out and expended or for services rendered prior to June 8th, 1886. The jury, in addition to the general verdict in favor of the plaintiff,
502 returned a special verdict as to each cause of action sued on. There was a motion by defendant for a new trial, which was overruled, and the appeal is from the order overruling this motion and from the judgment rendered on the general verdict.

The defendant requested the court to instruct the jury that the burden of proof was upon the plaintiff to establish that the services for which he claimed compensation were clearly outside of his duties as an officer or director of the corporation. This the court refused, except as given in the general charge by the court. It is contended in argument that the equivalent of this instruction was not given, and that the refusal to give the instruction asked or its equivalent was error.

As a general proposition, the instruction asked was correct. The plaintiff ordinarily must show by a preponderance of the evidence all the necessary facts to establish his cause of action; but it is not essential that such facts should be shown by the evidence offered by the plaintiff. It is sufficient if they are shown by the evidence introduced in the case, whether by the plaintiff or by the defendant. If the facts necessary to establish the plaintiff's cause of action or any one of them, where there are several, appear from the evidence introduced, it is sufficient. Hence it is not necessarily error for the court to fail or even refuse to give, when asked, such an instruction as the one requested in the case; but the jury should be instructed in all cases that the facts necessary to entitle a party to recover on his cause of action or counter-claim should appear from the evidence introduced by a preponderance thereof. This, we think, was done in this case.

503 The jury was told that "if a director or president or secretary of an incorporated company expects a salary or expects

compensation for his services * * * as such officer he must show an express authority or an express contract for the wages he claims, either by a vote of the board of directors or by some express contract entered into between him and the company." Again, the jury were told that "you must find, before the plaintiff can recover upon this cause of action, in the first place, that the services that were rendered were clearly outside of his duties as vice-president and director, and that they were rendered under such circumstances as raises an implied promise to pay for the services on the part of the company; and unless that is shown he cannot recover for any services rendered to the company under this cause of action." Further on in its instructions to the jury the court, referring to another cause of action, said: "You must find upon all these causes of action—this one as well as every other—it is the duty of the plaintiff to establish by a preponderance of evidence what the services or expenditures were. He must show them definitely and specifically." The court further said to the jury, "You are the sole judges of the facts in this case and of the credibility of all the witnesses and the weight of the testimony." We think the foregoing extracts from the instructions given by the court are the equivalent of that requested by the defendant, and that there was no error in the court not giving the instruction asked in the terms requested.

The defendant requested the court to instruct the jury that the plaintiff could not recover for any sums of money paid, laid
504 out, or expended by him for the defendant prior to June 5th, 1886, nor for any services rendered by him for the defendant prior to said date, because they were barred by paragraph 1, section 156, of the Code of Civil Procedure; which instruction was refused by the court, and the refusal is claimed as error.

The section of the statute as to the time within which actions may be begun is as follows: "Section 196. Within two years. 1st. An action upon a contract, obligation, or liability not founded upon an instrument of writing, also upon an open account for goods, wares, and merchandize and for any article charged in a store account: Provided, That action in said cases may be commenced at any time within two years after the last charge is made or the last payment is received."

This action was begun June 9th, 1888. The account of plaintiff for money paid and expended and the services rendered by plaintiff for the defendant as its general manager begun January 1st, 1883, and continued without interruption until about December, 1887. The defendant denied in its answer there was due plaintiff for money expended for its use in or about its business or otherwise "any sum in excess of the credits allowed plaintiff on plaintiff's open running account with defendant hereinafter alleged as a counter-claim." The answer of defendant alleged four different causes of action as counter-claims against the plaintiff arising out of the transactions between them, being for money received by plaintiff on sales of defendant's live stock, for pasturage of plaintiff's cattle on defendant's range, and for "a balance upon an account for money loaned, paid out, and expended to and for plaintiff, and for goods and materials

furnished to him, and for divers and sundry other items and
505 matters of charge, all on open running account and at plaintiff's request, between January 27th, 1883, and June 10th, 1888, amounting in all to about $30,000." The jury found specially the sum of $2,658.82 due the defendant from plaintiff on its counter-claim "upon open account," which was deducted from the amount found due the plaintiff, and the verdict was for the remainder.

Sec. 3149 Comp. Laws, 1888, provides that "In an action brought to recover a balance due upon a mutual open and current account where there have been reciprocal demands between parties the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side." According to the allegations of the parties there was "a mutual open and current account" and "reciprocal demands" between them from January 1st, 1883, down to the commencement of the action, and the instruction asked by defendant's counsel was properly refused.

It is contended that the evidence was insufficient to justify the verdict and judgment. The evidence was all contained in the record and is too voluminous to be reviewed here at length. It shows that the plaintiff and one Kerr owned substantially all the stock. Kerr was made a director and president of the company, while the plaintiff was made a director and vice-president. The other directors had each but a small quantity of stock, just enough to enable them to be made directors. The plaintiff, without having been formally appointed manager of the defendant's business, assumed the duties of manager with the knowledge and acquiescence of the directors and controlled its operations and superintended its affairs
from January, 1883, to December, 1887, with the exception
506 of a large number of sheep which were kept in Wyoming and which were under the care of Kerr, who made no charge for his services. The business of the defendant as declared in its article of incorporation consisted of "a general ranching, milling, canal, and live-stock business. It was to take up, appropriate, purchase, use, and sell water, water rights, water appropriations and powers, to buy, construct, operate, use, and sell water flumes, ditches, and other water —, to buy, improve, add water privileges to and sell agricultural and other lands; * * * to buy, manufacture, and sell flour, lumber, merchandise, agricultural products, and live stock, to construct, buy, operate, and sell mills, mines, ranches, manufacturies, water —, canals, ditches, and real estate connected therewith," etc., etc. It had a mill, ranch, and some live stock near Corinne, Utah, and a number of claims on the public lands, mostly desert entries, and large herds of sheep in Wyoming, and pastured horses and cattle belonging to others on its ranches. The plaintiff made all contracts for the company, bought and sold land and live stock, had charge of all horses and cattle delivered at the ranch, looked after the litigation in which the defendant was frequently engaged, and, in the language of the plaintiff when testifying, his duties as manager consisted of "tending to the business of the company, chasing fellows off the land, trying to guard the land, tend-

ing to stock on the ranch, digging ditches, superintending putting up fences, all contracts, and so forth."

The court instructed the jury in substance that, the evidence having shown that the plaintiff was a director and officer of the defendant, he could not recover for services rendered for the defendant, as such director or officer, unless there was an ex-
507 press contract between him and the defendant providing compensation for such services; that if the plaintiff rendered services clearly outside of his duties as an officer or director of the corporation the law would imply a promise on the part of the company to pay him the reasonable value thereof unless the circumstances under which the services were rendered negatived the presumption that he was to receive compensation for the same; that if it was not the intention of plaintiff to charge for such services while they were being rendered, or if it was the understanding of those engaged with him in the enterprise that the services he was rendering were simply as an incorporator and without any expectation of compensation on his part other than would result from the success of the enterprise and he was aware of such understanding on their part, then he could not recover therefor, even if he had a secret intention of claiming compensation for the same, and that in determin-g these questions the jury should take into consideration all the circumstances of the case—the course of business of the defendant; whether it was the custom of the defendant to conduct its affairs by the corporators, who should not receive payment for their services; whether plaintiff ever presented any claim to the company for the services, and other like considerations—and that if his claim for compensation was an after-thought, then he could not recover for the same, although they were rendered outside of his duties as a director and officer and were valuable to the defendant.

The law as given to the jury on this point is conceded by defendant's counsel to be correct and is abundantly supported by the authorities.

508 Angel & Ames on Corp., sec. 317.
Henry *vs.* R. & R. R. Co., 27 Vt., 635.
23 Am. & Eng. Corp. Cases, 712, 617, note.
Shackelford *vs.* N. O. & R. R. Co., 37 Miss., 202.
Santa Clara Min. Asso. *vs.* Meredith, 49 Md., 389, 400.
Cheeney *vs.* Lafayette & R. R. Co., 68 Ill., 570.
Lafayette & R. R. Co. *vs.* Cheeney, 87 Ill., 446.
Citizens' Nat. Bank *vs.* Elliott, 55 Iowa, 104.
Hall *vs.* Vt. & R. R. Co., 28 Vt., 408.

It was the peculiar province of the jury, under proper instructions from the court as to the law governing plaintiff's right to recover for the services claimed to have been rendered, to determine from the evidence whether or not he was entitled to compensation therefor. The jury found the issue in plaintiff's favor. Plaintiff claimed $250 per month from January 1st, 1883, to December 1st, 1887, amounting to $14,750. The jury allowed him $8,850 and $688.40 interest, amounting to $9,538.40. While the evidence to

sustain this verdict is not entirely satisfactory, and while, if submitted to this court originally on the printed testimony, a different conclusion might possibly be reached, yet, the jury having found for the plaintiff on part of his claim and the judge who heard the case in the court below having refused to set the verdict aside, we do not think it is so far unsupported by the evidence as to justify this court in doing so.

The judgment of the court below is therefor- affirmed.

We concur.

(Signed) ZANE, *C. J.*
BLACKBURN, *Judge.*

Endorsed on back: Title court & cause. Opinion. Filed July 12, 1890. Jos. P. Bache, clerk.

509 THE UNITED STATES OF AMERICA:

To Alexander Toponce and to Messrs. Kimball & White and J. G. Sutherland, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, A. D. 1890, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein The Corinne Mill, Canal and Stock Company is plaintiff in error and you, Alexander Toponce, are defendant in error, to show cause, if any there be, why the judgment rendered said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to each of the parties in that behalf.

Given under my hand, at Salt Lake City, Utah, this 30th day of September, A. D. 1890.

C. S. ZANE,
Chief Justice, Utah Territory.

A copy of the foregoing citation was served on me this 30th day of Sept., A. D. 1890.

JAMES N. KIMBALL,
J. G. SUTHERLAND,
Attorneys for Alexander Toponce, Def't in Error.

510 [Endorsed:] Supreme Court United States. The Corinne Mill, Canal & Stock Co., plaintiff in error, *vs.* Alexander Toponce, def't in error. Citation. Original. Filed in the supreme court Sep. 30, 1890, at Salt Lake City, Utah. Jos. P. Bache, clerk.

511 Know all men by these presents that we, John W. Kerr and Orange J. Salisbury, of the city and county of Salt Lake, Utah Territory, are held and firmly bound unto Alexander Toponce in the full sum of $22,700, lawful money of the United States of America, to be paid to said Alexander Toponce, his certain executors, administrators, attorneys, or assigns; to which payment well and truly made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of Sept., A. D. 1890.

Whereas lately, — a session of the supreme court of the Territory of Utah, in a suit pending in said court between Alexander Toponce, as respondent, and The Corinne Mill, Canal and Stock Company, a corporation, as appellant, — said Corinne Mill, Canal and Stock Company and in favor of said respondent, said Alexander Toponce, and the said appellant company having obtained a writ of error and filed a copy thereof in the clerk's office of said supreme court of — Territory to reverse said judgment in the aforesaid action, and a citation directed to said respondent, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, in the District of Columbia, the second Monday of October next, and the said supreme court of the said Territory of Utah, at said session, having fixed a supersedeas bond on such writ of error in the sum $22,700:

512 Now, the condition of the above obligation is such that if said appellant, said Corinne Mill, Canal and Stock Company, shall prosecute said writ of error to effect and answer all damages and costs if said appellant, said Corinne Mill, Canal and Stock Company, fail to make its plea good, then above obligation to be void; else to remain in full force and virtue.

JOHN W. KERR. [SEAL.]
ORANGE J. SALISBURY. [SEAL.]

Signed, sealed, and delivered in the presence of—
W. M BRADLEY.

Approved by—
JOS. P. BACHE,
Clerk of the Supreme Court of Utah Territory.

Endorsed on back: Title court & cause. Supersedeas bond. Filed Sept. 30, 1890. Jos. P. Bache, clerk.

513 Know all men by these presents that we, John W. Kerr and Orange J. Salisbury, of the city and county of Salt Lake, Utah Territory, are held and firmly bound unto Alexander Toponce in the full sum of $300, lawful money of the United States of America, to be paid to said Alexander Toponce, his certain executors, administrators, attorneys, or assigns; to which payment, well and truly made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of Sept., A. D. 1890.

Whereas lately — a session of the supreme court of the Territory of Utah, in a suit pending in said court between Alexander Toponce, as respondent, and The Corinne Mill, Canal and Stock Company, a corporation, as appellant, — said Corinne Mill, Canal and Stock Company and in favor of said respondent, said Alexander Toponce, and the said appellant company having obtained a writ of error and filed a copy thereof in the clerk's office of said supreme court of — Terri-

tory to reverse said judgment in the aforesaid action, and a citation directed to said respondent, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, in the District of Columbia, the second Monday of October next, and the said supreme court of the said Territory of Utah at said session having fixed a bond for costs on such writ of error in the sum of $300:

514 Now, the condition of the above obligation is such that if said a-pellant, said Corinne Mill, Canal and Stock Company, shall prosecute said writ of error to effect and answer all damages and costs if said a-pellant, said Corinne Mill, Canal and Stock Company, fail to make its plea good, then above obligation to be void; else to remain in full force and virtue.

JNO. W. KERR. [SEAL.]
ORANGE J. SALISBURY. [SEAL.]

Signed, sealed, and delivered in the presence of—
W. M. BRADLEY.

Approved by—
JOS. P. BACHE,
Clerk of the Supreme Court of Utah Territory.

Endorsed on back: Title court and cause. Bond for costs. Filed Sept. 30, 1890. Jos. P. Bache, clerk.

515 In the Supreme Court of the United States.

CORINNE MILL, CANAL & STOCK COMPANY, Plaintiff in Error,
vs.
ALEXANDER TOPONCE, Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error above named, and, upon the record and proceedings of the supreme court of Utah Territory, assigns the following errors:

1. The court erred in not reversing the judgment and verdict in the trial court upon the third count or cause of action stated in the complaint, because said trial court failed and refused to instruct the jury, as requested by the defendant, that if they found from the evidence that any of the services in the third cause of action mentioned were done and performed by plaintiff prior to June 9th, 1886, that they must not find the worth or value of any such services for plaintiff or give him the benefit of same in their verdict, the cause of action for any and all such services rendered prior to that date being barred by the statute of limitations.

2. The court erred in not reversing the judgment of the trial court upon the third cause of action stated in the complaint

516 because there was no evidence introduced or offered to show or which tended to show that there was any promise or agreement, express or implied, on the part of defendant (plaintiff in error herein) to pay for any of the services mentioned in said third count.

3. The court erred in not reversing the judgment of the trial court on the third count or cause of action in the complaint, because said trial court failed and refused to instruct the jury, as requested by defendant below (plaintiff in error herein), "that, on the evidence in the case relating to the third cause of action alleged in the complaint, your verdict on that cause of action should be for defendant."

4. The court erred in not reversing the judgment of the trial court upon the third count or cause of action stated in the complaint, because the verdict of the jury upon said third count was contrary to and in disregard of the instructions given by the trial court in respect to said cause of action.

(Signed) C. W. BENNETT,
JOHN A. MARSHALL,
Attorneys for Plaintiff in Error.

Endorsed on back: Title court & cause. Assignment of errors. Filed Oct. 8, 1890. Jos. P. Bache, clerk.

517 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Alexander Toponce, plaintiff and respondent, and The Corinne Mill, Canal and Stock Company, defendant and appellant, manifest error hath happened, to the great damage *to* the said The Corinne Mill, Canal and Stock Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal Supreme Court, Territory of Utah, United States of America.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, and the seal of the supreme court of Utah Territory, this 30th day of Sept., in the year of our Lord one thousand eight hundred and ninety.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

518 [Endorsed:] Supreme court of Utah. File No. —. The Corinne Mill, Canal & Stock Co., plaintiff in error, *vs.* Alexander Toponce, def't in error. Writ of error. Original. Filed in the supreme court & a copy lodged in my office this 30th day of Sept., 1890. Jos. P. Bache, clerk.

519 UNITED STATES OF AMERICA.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, Joseph P. Bache, clerk of the supreme court of Utah, in pursuance of the attached writ of error do return annexed hereto and to said writ the original citation, a transcript of the record, the proceedings, opinion, assignment of errors, supersedeas bond & bond for costs, all in and of said court in the cause in said writ described, to the Supreme Court of the United States, and I hereby certify that said annexed transcript of said record, proceedings, opinion, assignment of errors, and bonds is a full, true, and complete copy of the several originals thereof on file or of record in my office.

Seal Supreme Court, Territory of Utah, United States of America.

In witness whereof I hereunto set my hand and affix the seal of said supreme court, at Salt Lake City, Utah, this eighth day of October, in the year of our Lord one thousand eight hundred and ninety.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 14,276. Utah Territory supreme court. No. 257. The Corinne Mill, Canal & Stock Company, plaintiff in error, *vs.* Alexander Toponce. Filed October 14, 1890.

FEB 16 1
JAMES H. McKEN
Cl

Supreme Court of the United States

OCTOBER TERM, 1893.

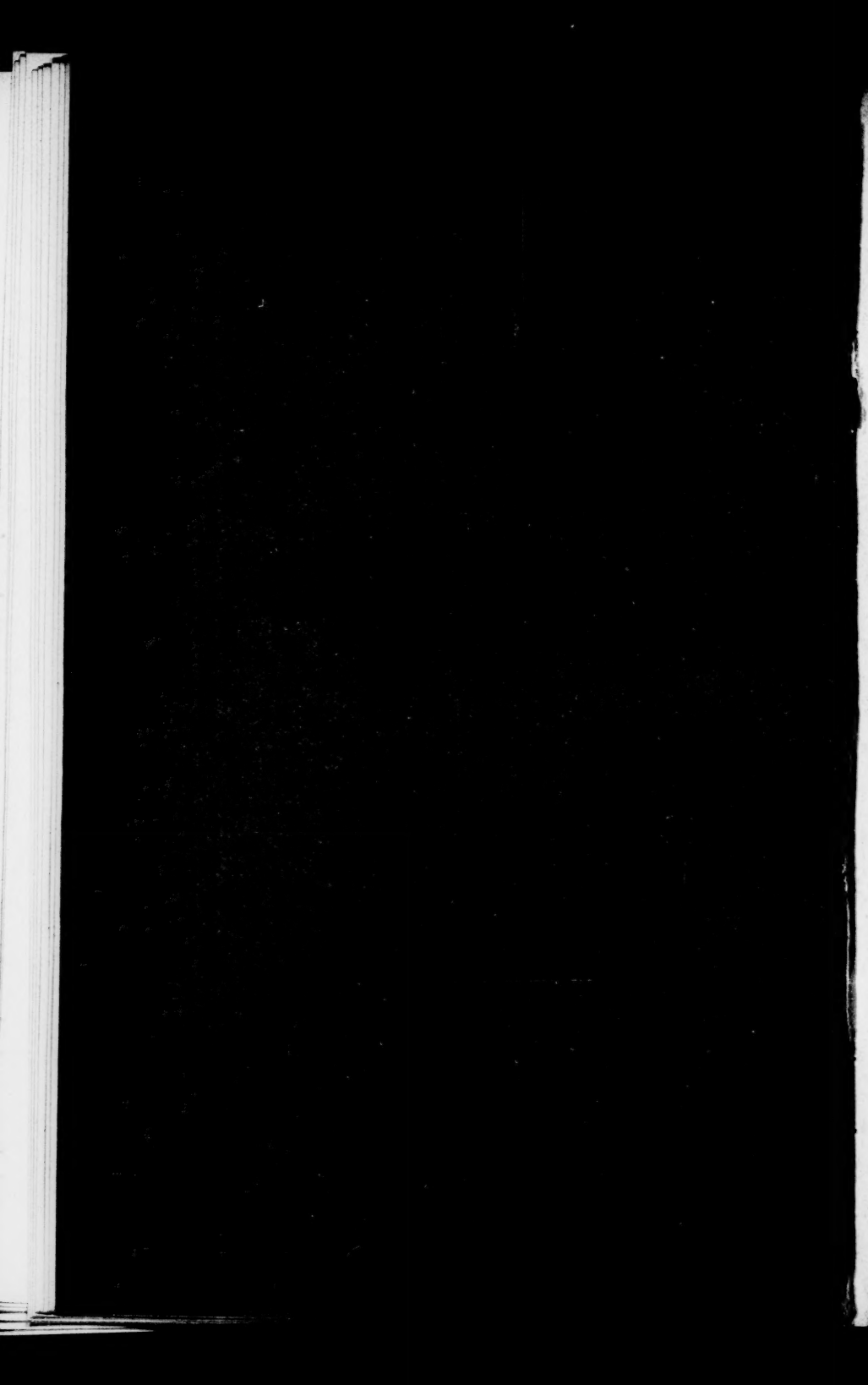
No. 257.

CORINNE MILL, CANAL AND STOCK COMPANY,
Plaintiff in Error,
vs.
ALEXANDER TOPONCE,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR PLAINTIFF IN ERROR.

C. W. BENNETT,
JOHN A. MARSHALL,
Attorneys for Plaintiff in Error.



IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 257.

APPELLANT'S BRIEF.

STATEMENT.

The plaintiff in error, defendant below, is a corporation, and was incorporated under the Laws of Utah Territory, January 2nd, 1883.

Record, pp. 186-190.

The third cause of action in the complaint stated, is for the value of certain services alleged to have been rendered by the plaintiff below to the defendant, from January 1st, 1883, to December 1st, 1887, and claimed to be reasonably worth the sum of $250 per month, aggregating $14,750.

Record, pp. 1-2.

Upon this alleged cause of action the plaintiff below had verdict and judgment for $8,850 principal, and $688.40 interest, aggregating $9,538.40.

Record, pp. 8-10.

During the whole of this period—that is to say, from the date of the incorporation of the defendant company until the 20th day of December, 1887—the plaintiff below was one of its board of directors and the vice-president thereof.

See plaintiff's testimony. Record, pp. 26-27.

Article I of the By-Laws of the defendant—adopted at the time of its organization—provides that the board of directors shall determine and fix the compensation of all officers of the company.

Record, p. 191.

It is not pretended that there was ever any attempt by the board to fix the compensation of any of the directors.

The defendant below interposed the plea of the Statute of Limitations to a recovery on said count so far as the same related to or was made up of the alleged value of services alleged to have been rendered prior to June 9th, 1886.

Record, p. 7.

And requested the Court to instruct the jury that they could not find for the plaintiff as to any services rendered prior to June 9th, 1886, because as to all such services the claim was barred by the statute.

Said request is as follows:

4. "If you find from the evidence that any of the services in the third cause of action alleged were done and performed by plaintiff prior to June 9th, 1886, then you must not find the worth or value of any such services for plaintiff, or give him the benefit of same in your verdict; the cause of action for any and all such services rendered prior to that date is barred by paragraph 1 of Section 196 of Code of Civil Procedure, and plaintiff cannot recover their worth or value from defendant in this action or any part thereof.

Refused. H. P. HENDERSON,"

Record, p. 232.

Section 196 of Code of Civil Procedure is Section 3145 of Compiled Laws, cited below.

ASSIGNMENT OF ERRORS.

"Now comes the plaintiff in error above named, and upon the record and proceedings of the Supreme Court of Utah Territory, assigns the following errors:

1st. The Court erred in not reversing the judgment and verdict in the trial Court upon the third count or cause of action stated in the complaint, because said trial Court failed and refused to instruct the jury, as requested by the defendant, that if they found from the evidence that any of the services in the third cause of action mentioned were done and performed by plaintiff prior to June 9th, 1886, that they must not find the worth or value of any such

services for plaintiff, or give him the benefit of same in their verdict, the cause of action for any and all such services rendered prior to that date being barred by the Statute of Limitations.

2d. The Court erred in not reversing the judgment of the trial Court upon the third cause of action stated in the complaint, because there was no evidence introduced or offered, to show, or which tended to show that there was any promise or agreement, express or implied, on the part of defendant (plaintiff in error herein), to pay for any of the services mentioned in said third count.

3d. The Court erred in not reversing the judgment of the trial Court on the third count or cause of action in the complaint, because said trial Court failed and refused to instruct the jury as requested by defendant below (plaintiff in error herein) "that, on the evidence in the case relating to the third cause of action alleged in the complaint, your verdict on that cause of action should be for defendant."

4th. The Court erred in not reversing the judgment of the trial Court upon the third count or cause of action stated in the complaint, because the verdict of the jury upon said third count was contrary to and in disregard of the instructions given by the trial Court in respect to said cause of action."

Filed October 8th, 1890.

Record, pp. 271-2.

Rule 35 of this Court was promulgated November 3d, 1890.

BRIEF OF ARGUMENT.

I.

The first assignment of error relates to the plea of the Statute of Limitations, to so much of the third cause of action as is for the value of certain services alleged to have been performed by the defendant in error (plaintiff below) for the plaintiff in error, from January 1st, 1883, to June 9th, 1886.

This action was commenced June 9th, 1888.

Record, p. 3.

The statutes of Utah provide: "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows."

1 Compiled Laws, Sec. 3141, p. 224.

"Within two years (1) all actions upon a contract, obligation or liability, not founded upon an instrument of writing; also on an open account for goods, wares and merchandise, and for any article charged in a store account; provided that action in said cases may be commenced at any time within two years after the last charge is made or the last payment is received."

1 Compiled Laws, Sec. 2145, pp. 224-5.

Manifestly the proviso applies to "open accounts" and "store accounts" only.

Said fourth request was refused and herein we claim there was error.

"When services in the management of a farm and household are performed under a general retainer, without any express agreement as to the time or measure of compensation or the term of the employment, and such services continue for a series of years, no payments being made, the law for the purpose of determining when the Statute of Limitations begins to run will not imply an agreement that the payment of compensation shall be postponed until the termination of the employment, but will regard the hiring as from year to year, and the wages as payable at the same time."

Laws of Utah, 1884, p. 188, Sec. 196, Subd. 1.
Davis vs. Gorton, 16 N. Y., 225.
Matter of Application of Gardner, 103 N. Y., 533.
Miller vs. Lash, 85 N. C., 51.
S. C., 39 Am. Rep., 678.
Wood Stat. Lim., p. 268, Sec. 120.

II.

The defendant below (plaintiff in error here) requested the trial Court to instruct the jury that "on the evidence in the case relating to the third cause of action alleged in the complaint, your verdict on that cause of action should be for the defendant." This request was refused and defendant duly excepted.

Record, p. 235.

"There was no evidence introduced or offered to show, or which tended to show that there was any promise or agreement, express or implied, on the part of defendant (plaintiff in error herein) to pay for any of the services mentioned in said third count." Second Assignment of Error.

First—The directors of a corporation are not entitled to any compensation for services rendered by them as such directors, no matter how laborious the same may be, or how beneficial to the company, unless the salary is fixed by the by-laws or a resolution of the board before the services are performed.

1 Morawetz Private Corporations, Sec. 508.
Kilpatrick vs. The Penrose Ferry Bridge Co., 49 Pa. St., 118.
Gridley vs. L. B. & M. Ry. Co., 71 Ill., 200.
Holden vs. L. B. & M. Ry. Co., 71 Ill., 106.
The Illinois Linen Co. vs. Hough, 91 Ill., 63.
New York & New Haven Ry. Co. vs. Kitchum, 27 Conn., 169.
Smith vs. 61 N. H., 632.

We concede that if a director render services for the corporation which are clearly and unquestionably beyond the range of his official duties, the law will—in the absence of an express agreement to that end—imply a promise on the part of the company to pay him the reasonable value thereof, provided the circumstances under which such services were rendered do not negative the presumption or

implication that he was to receive compensation for the same.

But we submit that in such case the plaintiff—seeking to recover for such services—has upon himself the burden of showing that they were clearly outside of his duty as a director merely. That when a director, through a series of years, has rendered services generally for his company, some of which services fall within the limits of his official duties, and others, it may be, lie outside of and beyond these limits, he is entitled to recover nothing upon proof merely as to what his services were worth as a whole. Before he can recover he must of necessity be required to separate and distinguish these two classes of services by his proofs; he must show precisely what labor or service he did perform for the company which was clearly outside of his duties as a director, and the value of such labor or service apart from the value of the services rendered by him in the line of his duty as such officer.

This we say the plaintiff in this case has wholly failed to do. He introduced evidence of the reasonable value of his services generally, but the evidence shows that in great part these services fall clearly within the limits of his official duties. It appears that there were five stockholders in the company, all of whom were directors, viz: The plaintiff below, John W. Kerr, D. H. Spencer, J. K. Fowler and I. H. Fowler. Substantially all the stock was held and owned by the plaintiff and John W. Kerr, in about equal proportions, the other directors subscribing for sufficient merely to qualify them as directors.

Record, pp. 186-187.

The defendant company was carrying on a ranch, stock and mill business. It had a mill, ranch and some stock near Corinne, in Utah, and large herds of sheep in Wyoming.

Lee Owsley, a witness for the plaintiff, was selected by the plaintiff and Mr. Kerr as foreman of the defendant's ranch and stock business near Corinne.

Record, pp. 13-22.

He testifies that he was employed in 1883—in July—to take charge of the ranch and handle the stock. That he had individual charge of the ranch subject to the supervision of the plaintiff.

Record, pp. 12-13.

On pages 13-14 of Record he says: That plaintiff was general foreman and had general charge of everything. In answer to the question: What, if anything, did he (plaintiff) have to do with the men and the stock on the ranch? The witness says: "Well, he made all contracts for everything that came on the ranch. I handled them under his supervision—under his orders." On page 19 of Record, he says that his duty was to take charge of all horses and cattle that were delivered to the ranch, and also to tend the company's stock, excepting the sheep. And, again, page 19, that he took general care of the ranch.

On pages 27-28, of Record, the plaintiff testifies, in answer to the question: Well, now state what part of the business you had charge of and what you did? "I had charge of the entire business—had charge of the land, sold and purchased the land; purchased horses and sold them; sold land and

done everything. That Mr. Owsley was foreman, but that plaintiff employed and discharged men, and that all the men were under his control. The foreman, Owsley, could discharge men. That plaintiff employed the foreman, Owsley. That the two first foreman were employed by Kerr to look after and take charge of the sheep.

On cross-examination, plaintiff, in answer to the question "In what did your duties consist, or in what did your labors consist during these years?" testified as follows: "Well, knocking around, tending to the business of the company. Chasing fellows off the land, trying to guard the land, tending the stock on the ranch, digging ditches, superintending putting up fences, all contracts and so forth."

Record, p. 42.

The witness Owsley says, on cross-examination, pages 19-20 of Record, in answer to the question: "How much of the time did Alex. (plaintiff) spend on the ranch?" "Well, he come there off and on; sometimes twice a week; sometimes every day in the week; sometimes it would be a week or two before he would get there." And further that plaintiff was simply general manager and that he, witness, was working under his orders.

It appears that Mr. Kerr, also a director and the other principal stockholder, exercised a like general supervision over defendant's sheep in Wyoming, and other branches of the company's business.

Testimony of J. K. Fowler, Record, p. 132.
Testimony of J. W. Kerr, Record, pp. 171-172.
Testimony of plaintiff, Record, pp. 40-41-43-44.

Now, Article I of the By-Laws—Record, pp. 191-2, provides among other things that the directors shall have supervision over all the business affairs of the company. Hence any and all services rendered by the plaintiff and Mr. Kerr, or either of them, by way of exercising a general supervision over any branch of the defendant's business, would clearly be within the line of their official duties. It should be so ruled, as matter of law, especially in view of the fact that the directors rarely assembled in board meeting all through these years, the only meetings of the board being as follows: February 17th, 1883; June 7th, 1883; January 19th, 1884; October 27th, 1884; January 15th, 1885; and November 7th, 1887.

Record, pp. 119-120-192-200.

In Kilpatrick vs. Penrose Ferry Bridge Co., 49 Pa. St., 118, the president and treasurer had labored faithfully in the business of the corporation; the company's bridge had been erected under their supervision, and it was conceded that their services were reasonably worth from $350 to $500 per annum; yet there it was held that there could be no recovery, in the absence of an express contract.

In Holden vs. L. B. & M. R'y. Co., 71 Ill., 106, the plaintiff, who was one of the directors, was elected treasurer and served as such from 1st of September, 1867, to January 31st, 1872, when he settled with the company and they allowed him $4,000 for his services as treasurer and gave a warrant of attorney to confess judgment for that amount, and judgment was confessed accordingly. Afterwards this judgment was set aside and the company let in to defend-

and the issues were found for the defendant. On appeal, Mr. Justice Walker, speaking for the Court, after stating the facts as above, says: "The question is whether the services thus rendered were extraordinary and entirely disconnected from the duties devolved upon him as director. The board of directors were in the possession of the funds and property of the corporation, and that body had entire control over it, and could disburse it as they chose, either by themselves, by one or more of their number, or by some other person not of the board of directors. Having done so through one of their members, we must snppose that they chose to regard it as a part of his duty as director. Had not such been the intention, it seems to us that a salary would have been provided by a by-law or resolution."

See also the cases hereinbefore cited.

So far as the plaintiff was engaged, if at all, in actually digging ditches, chasing fellows off the ranch, or in actually tending stock, his services may be said to be outside his duty as a director. But that all such services rendered by him must have been trival in character, is shown by his own testimony. On page 42 of Record, he says: "I don't suppose I stayed on the ranch at one time more than two or three days together. I'd go up there and come back the same day."

See also testimony of Owsley, Record, p. 19.

Moreover, the plaintiff did not attempt to show the extent or the value of services of this character, or of any other service, if any there was, rendered by him which lay outside his official duty.

Second—As already pointed out the by-laws provide that the compensation of all officers shall be fixed by the board of directors. Such being the case and the compensation of the plaintiff never having been fixed, he could maintain no action on account of services rendered without first requesting the company to fix his compensation.

2 Chitty Contracts, p. 799, Note "N."
Owen vs. Bowen, 4 C. & P., 93.

No request or demand was made by plaintiff prior to the bringing of this action.

Testimony of plaintiff, Record, p. 41.

Third—All services rendered by plaintiff and which constitute the alleged cause of action in the third count of the complaint stated were entirely gratuitous. The defendant never expected to pay anything therefor, nor did the plaintiff intend to make any charge for the same. This is perhaps sufficiently manifest from the circumstances surrounding the parties and their course of dealing. As already shown, the plaintiff and John W. Kerr, two of the directors, owned substantially all the stock of the defendant company and were practically equally interested therein. It was to the interest of each to devote his time and attention to the business of the corporation, with no expectation of any compensation or reward therefor other than such as would result to them respectively through the success of the general enterprise. We see that both of them did render valuable service to the corporate business throughout the

period covered by said third count. Mr. Kerr never has made any charge for his services.

See testimony of Kerr, Record, p. 172.
See Plaintiff's testimony, Record, p. 41.

And the plaintiff never made any charge against the company all through these years until he commenced this suit.

See his own testimony, Record, pp. 41-2.

And this, nowithstanding his account with the company was largely overdrawn from August 1st, 1885.

Record, pp. 143-4.
And Exhibit 22½, Record, pp. 211 to 223.

We might rest on these circumstances, about which there is no controversy, and safely contend that plaintiff never intended to make any charge for these services. How else can his failure to make any claim therefor on the company from January 1st, 1883, to June 9th, 1888—the date suit was commenced—during much of which time he was overdrawing his account, be accounted for?

But we have direct and conclusive evidence to the same effect.

Mr. Kerr testifies that it was agreed between himself and the plaintiff that they were to put in their services free of charge.

Record, p. 173.

It is needless to say that this statement finds strong corroboration in all the circumstances surrounding the par-

ties and the course of dealing from the inception of the incorporation to the date of the suit.

But the matter is put beyond cavil by the plaintiff's own evidence. He says that he did not intend to make any charge against the company for these services. That in January, 1883, the company was indebted to Kerr in the sum of $71,000 as the balance of the purchase price of sheep sold by Kerr to the company, and it was then agreed between Kerr and the plaintiff that Kerr was not to charge any interest on that sum and that the plaintiff was not to have any salary for his services. That thereafter, in August, 1887, Kerr sued the company, charging interest on the said purchase money, whereupon plaintiff confessed judgment for the company in said suit, and then he, plaintiff, as he expresses it, turned in and sued the company for his services.

Record, pp. 43-4-5-92.

It cannot be disputed, therefore, that the company never expected to pay for these services and that plaintiff never intended to charge therefor.

While it is not very material so far as the parties to this action are concerned, whether the agreement with respect to salary was as stated by Mr. Kerr, or as stated by plaintiff, yet we direct attention to the evidence, from which it clearly appears that plaintiff is mistaken when he states that Kerr was not to receive interest on said sum of $71,000.

See testimony of plaintiff—Record, pp. 45-6-7-8—read in connection with defendant's Exhibit "1" therein referred to and found on pages 206-7 of Record.

Testimony of Kerr, Record, pp. 170-1-2-3-4.
Testimony of J. K. Fowler, Record, pp. 121-2-3.

But if Mr. Kerr was not entitled to charge the company with interest, and did so in disregard of his agreement, thereby perpetrating a wrong upon the company, surely this would not authorize the plaintiff to recover against the company for services rendered by him and for which the company never expressly or impliedly promised to pay and for which plaintiff at the time he rendered the same did not intend to make any charge. This would be to subject the company to an additional wrong.

Moreover, if Kerr was not to have any interest, it was the duty of the plaintiff to have protected the company against that claim, which he could have done as a mere stockholder.

We need not stop to cite authorities to support the proposition that when one renders services to another voluntarily, and for which he intends to make no claim at the time the same are rendered, he can recover nothing therefor.

In Pew vs. Gloucester Nat. Bank, 130 Mass., 391, the plaintiff, a director of the defendant company, and also one of a committee appointed by the directors to superintend the alteration and repair of a building of the defendant, devoted all his time to the supervision of such repairs, from August 21st, 1872, to February 21st, 1873, and upon suit brought by him to recover the reasonable value of such services, he was defeated. Morton, J., rendering the opinion, says: "It often happens that persons render services for others which all parties understand to be gratuitous. Thus,

directors of banks, and many other corporations, usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an implied promise, it must be shown, not only that the services were valuable, *but also that they were rendered under such circumstances as to raise the presumption that the parties intended and understood that they were to be paid for, or at least, that the circumstances were such that a reasonable man in the same situation with the person who receives and is benefiitted by them would and ought to understand that compensation was to be paid for them.*"

Fourth—As to this third cause of action, the Court instructed the jury as follows: "Even though the labor may have been performed outside of the officer's duty, yet they must be under such circumstances as will imply a promise to pay for them. If a person is interested in an enterprise and takes hold and gratuitously, and for the purpose of promoting the enterprise, together with the other incorporators, renders services to the company, and it is not intended to charge for them, and it is his understanding all along not to charge for them, and that he is not to receive any compensation except such as he receives through his interest in the concern, then he cannot charge for those services. They are gratuitous so far as the corporation is concerned." * * "Even though it may be plain that afterward, on account of some wrong or supposed wrong he had suffered from the company, in which he thought or it might be the fact, that

they had not treated him as they ought, or he may not have been admitted to his full rights as he thought, or as you may think; if it was an after-thought that he should charge for these services, he cannot recover for them."

Record, pp. 241-2.

The verdict on the third count was in direct conflict with this instruction, as is shown by the plaintiff's own testimony. This of itself calls for a reversal.

Flemming vs. Marine Ins. Co., 4 Whart., 58.
Bunton vs. Orient Mutual Insurance Co., 4 Bosw., 254.
Emerson vs. County of Santa Clara, 40 Cal., 543.
Declez vs. Save, 71 Cal., 552.

Fifth—The defendant requested the Court to charge the jury that the burden was upon the plaintiff to establish that the services for which he claimed compensation were clearly outside of his duties as an officer or director, as follows:

8. "To entitle plaintiff to recover from defendant for any services he may have rendered defendant while he was an officer or director of defendant, plaintiff must establish by the preponderence of the evidence that there was either (1) an understanding or agreement between him and defendant that he should be paid for the same, or (2) that the services so performed were clearly outside of his duties as an officer or director. The burden of proof is on plaintiff to establish either one or the other of those two points, and if plaintiff has not proven to your satisfaction either of those

points then your verdict as to such services should be for defendant."

Record, p. 233, eighth request.

This was refused and the equivalent thereof was nowhere given by the Court in its charge. Herein we submit there was manifest error.

C. W. BENNETT,
JOHN A. MARSHALL,

Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

No. 257.

IN THE

Supreme Court of the United States

October Term, 1894.

CORINNE MILL, CANAL AND STOCK CO.,
Plaintiff in Error.

vs.

ALEXANDER TOPONCE,
Defendant in Error.

In Error to the Supreme Court of the Territory of Utah.

BRIEF FOR DEFENDANT IN ERROR.

JAMES N. KIMBALL,
Attorney for Defendant in Error.

FILED.....1894.

.....Clerk.

ACME PRINTING CO., OGDEN

IN THE

Supreme Court of the United States

October Term, 1894.

CORINNE MILL, CANAL AND STOCK CO.,
Plaintiff in Error.

vs.

ALEXANDER TOPONCE,
Defendant in Error.

Brief for Defendant in Error.

In plaintiff in error's brief there is complaint of the finding and judgment on one count only, the third count. It is a count for ~~plaintiff's~~ Defendant in Error's services for the ~~defendant~~ plaintiff in the capacity of general manager, from January 1st, 1883, to December 1st, 1887. Two hundred and fifty dollars per month was alleged to be a reasonable compensation, amounting to $14,750. The jury allowed

$9,538.40, including interest from the commencement of the suit.

We contest all the propositions in the brief of the plaintiffs in error.

None of the services sued for are such as pertain to the office of director. A director when employed to perform services as an agent or manager is entitled to compensation.

> Ten Eyck vs. Pontiac etc. Railroad Co., 74 Michigan, 226.
>
> New Orleans etc. Packet Co. vs. Brown, 36 La. Ann. 138.
>
> Mayor etc. of Niles vs. Muzzy, 36 Michigan, 61.

The duties and powers proper of a director can not be delegated. That is a recognized test on the question of compensation.

> Henry vs. R. & R. R. Co., 27th Vt. 635.

In that case recovery was sanctioned beyond the compensation allowed to directors as such.

The court say: "Services of that character (*i. e.* in that capacity) can not be delegated to others. The defendant in error's duty as a director must be discharged by him individually, in the exercise of his own judgment and discretion. This is a safe and proper rule to ascertain whether these services are of that character and fall within the perview of that vote."

This case holds that a director may be employed as agent, and when so employed is entitled to receive the same compensation as other agents. To this effect is the general current authority, text writers and cases.

Angel & Ames on Corp., 317.

1 Morawitz on Corp., 508.

23 Am. & Eng. Corp. Ca. 712, 617 note.

Jackson vs. N. Y. Cent. R. R. Co., 2 T. & C. 653.

Shackelford vs. N. O. & R. R. Co., 37 Miss. 202.

Santa Clara Min. Asso. vs. Meredith, 49 Md. 389, 400.

Cheeney vs. Lafayette etc. R. R. Co., 68 Ill., 570.

Lafayette etc.. R. R. Co. vs. Chaney, 87 Id 446.

Citizens Nat. Bank vs. Elliott, 55 Iowa, 104.

Hall vs. Vt. etc. R. R. Co., 28 Vt., 408.

Evans vs. City of Trenton, 24 N. J. L.769.

Gardner vs. Butler, 30 N. J. Eq., 703.

First Nat. Bank vs. Drake, 1 Am. Eng. Corp. Ca., 210.

A bank corporation was authorized to establish, equip and run a ferry. Its board of directors appointed one of its members with others to contract for a

steamboat, and if they thought proper superintend its building.

The director acted, performed this agency, and in a suit for his compensation it was contended on the defense that the charter provided that "no director shall be entitled to any emolument unless the same shall have been allowed by the stockholders at a general meeting." And the claim in question had not been so allowed. The court thus answered this defense:

"It was the intention of the legislature by inserting this clause in the charter to prevent the directors from taking compensation for the performance of their appropriate duties; but its sound construction does not require the exclusions of the individuals of the board for just compensation for services of a different character, merely because they were rendered while they were directors. Services may be wanted requiring mechanical or professional skill, as for instance the engraving of the plates, the making of paper, etc. Should one of the directors be competent to perform this work the charter was never intended to prohibit his employment for that purpose. And again, services may be required, which, although they might be performed by the whole board of directors, yet are to be transacted at ~~different~~ distant places, or under circumstances which would make it extremely inconvenient for a body of men to

attend to them, and where a proper discharge of their duties to the company would require of the directors to constitute an agency. In such cases I see no objection to their employing one of their own number as their agent. Indeed the nature of the business may often be such as would render it highly expedient. And if they should do so, such agent may surely demand and be paid a reasonable compensation for his services."

In the Maryland case cited the court cites a multitude of cases and tersely states the principal they sustain as follows:

"If a president or director of a corporation renders services to his corporation which are not within the scope of and are not required of him by his duties as president or director, but are such as are properly to be performed by an agent, broker or attorney, he may recover compensation for such services upon an implied promise."

The court announces in the same case that "agency for a corporation is not required to be shown by a resolution of the board of directors or other written evidence, but it may be inferred from facts and circumstances," citing.

Union Bank vs. Rigely, 1 Har. &. G. 326.

1 Md. Ch. Dec., 398.

Elysville Man. Co. vs. Okisko Co., 5 Md. 159.

N. C. Ry. Co. vs. Bartian, 15 Id. 501.

Bk. of U. S. vs. Danrige, 12 Weat, 69, 70, and 83.

The foregoing views are in accordance with the almost clear and unbroken current of authority. The rulings in Pennsylvania and Massachusetts are in some degree exceptional.

Second. There is no ground in this record for saying that the services of the defendant in error were intended to be gratuitous.

The defendant in error had an understanding with Kerr, after the purchase of the sheep, that his services were to offset the interest on the debt of $71,000. That was in the nature of things a temporaay understanding while the debt stood. At first it would be in some degree unequal. But they, like all men engaged in an enterprise and expecting success, did not anticipate that this debt would remain unpaid. It was expected to be reduced by degrees and finally that inequality would be reversed. This effect would be a direct compensation for his services. It is mentioned to show that the defendant in error's intention was to be remunerated. That agreement was not available to the company because it was not a party to it. Had it been carried out the defendant in error, as a stockholder would have received in the increased issue of his stock a com-

pensation equal to or greater than that allowed by the jury.

Kerr having charged interest by making a company note to include it, the defendant in error is entitled to recover for his services, and through this circuity the offset is realized.

See record, pages 45, 46 and 47.

The jury in deciding for the defendant in error and thereby incidentally finding that the services were not intended to be gratuitous, did not proceed contrary to the charge of the court on that subject.

The instruction left the question to the jury. That implies that there was evidence for the jury to consider in favor of the defendant in error. Had there been none, the court would have directed a verdict for the plaintiff in error on that count.

The verdict merely disposed of a question submitted to the jury.

Fourth. The statute of limitations has no application, for there were mutual accounts, or "reciprocal demands between the parties."

Section No. 3149, Compiled Laws of Utah, provides as follows:

"In action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause